

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
3 NORTHERN DIVISION

4 NATIONAL ASSOCIATION FOR THE ADVANCEMENT PLAINTIFFS
5 OF COLORED PEOPLE, ET AL.

6 VERSUS CIVIL ACTION NO. 3:23-cv-00272-HTW-LGI

7 TATE REEVES, ET AL. DEFENDANTS

8
9 MOTIONS PROCEEDINGS
10 BEFORE THE HONORABLE HENRY T. WINGATE,
11 UNITED STATES DISTRICT COURT JUDGE,
12 JUNE 14, 2023,
13 JACKSON, MISSISSIPPI

14
15 (APPEARANCES NOTED HEREIN.)
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12

13 ALSO PRESENT: CHIEF JUSTICE MICHAEL K. RANDOLPH
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IN OPEN COURT, JUNE 14, 2023

THE COURT: Terri, call the case, please.

THE COURTROOM DEPUTY: Your Honor, this is the National Association for the Advancement of Colored People, et al. versus Tate Reeves, et al, Civil Action No. 3:23-CV-272-HTW-LGI.

At this time, I am going to ask all the parties to introduce themselves for the record.

MR. RHODES: May it please the Court, Your Honor, Carroll Rhodes and Brenden Cline for the plaintiffs.

THE COURT: Good morning. All right. Anybody else on the plaintiffs' side over here?

MR. JOHNSON: Your Honor, you have a team of plaintiffs' lawyers from the case currently pending before Judge Lee on the consolidation motion. I'm Cliff Johnson on behalf of those plaintiffs here with Paloma Wu, Rob McDuff, and assisting us, Blake Feldman. Good morning.

THE COURT: All right. Thank you. Good morning to you.

All right. Let's turn to the defense.

MR. SHANNON: Good morning, Your Honor. Rex Shannon along with my cocounsel, Gerald Kucia, from the Mississippi Attorney General's Office. We are on behalf of the remaining defendants in the principal NAACP case.

1 THE COURT: All right. Good morning to you.

2 MR. WILLIAMS: Good morning, Your Honor. Chad Williams
3 here on behalf of respondent, Commissioner Sean Tindell and
4 Chief Bo Luckey to respond to the matter Mr. Johnson
5 referenced.

6 THE COURT: All right. Good morning to you.

7 MR. WILLIAMS: Good morning.

8 MR. MINOR: Wilson Minor, cocounsel with Mr. Williams.

9 THE COURT: All right. Good morning.

10 MR. NELSON: Good morning, Your Honor. Mark Nelson for
11 the defendant, and Chief Justice Michael Randolph to my
12 right, who is appearing in his official capacity today.

13 THE COURT: All right. Good morning. Good morning,
14 Chief Justice.

15 CHIEF JUSTICE RANDOLPH: Good morning.

16 THE COURT: Anybody else? All right then.

17 I have several motions here, and I intend to get to all
18 of the motions. There aren't but three major motions, but I
19 am going to take them probably out of turn.

20 I'll start with the consolidation matter, and I'll
21 start with that one and then move to the other two rapidly
22 thereafter, but I do intend to address all motions that are
23 still outstanding.

24 So let's start with the consolidation issue. This
25 matter is being brought from this side of the table and

1 being opposed over here. So then who is going to make the
2 argument on consolidation?

3 MS. WU: Your Honor, I'll be making the argument.

4 THE COURT: Go to the podium, please, and speak
5 directly into the microphone.

6 MS. WU: Good morning, Your Honor.

7 THE COURT: Good morning. Now, you filed your motion
8 for consolidation. I have read the motion and your
9 memorandum. And then there has been response in opposition.
10 And I take it that you have studied the opposition.

11 MS. WU: I have, Your Honor.

12 THE COURT: And in your oral presentation to the Court,
13 do you expect not only to highlight your position but also
14 to tell me what quarrel you have with the other side's
15 submission?

16 MS. WU: I will, Your Honor.

17 THE COURT: All right. Then go right ahead. How much
18 time do you need?

19 MS. WU: Twenty minutes, Your Honor, 15.

20 THE COURT: If you need more time, just tell me.

21 MS. WU: Thank you, Your Honor.

22 THE COURT: I want to make sure you do a thorough job.

23 MS. WU: Thank you, Your Honor.

24 THE COURT: Okay. Go right ahead.

25 MS. WU: May it please the Court, my name is Paloma Wu.

1 Together with my cocounsel, Cliff Johnson and Rob McDuff, we
2 represent the plaintiffs in the matter JXN Undivided
3 Coalition versus Tindell, Civil Action No. 3:23-cv-351.

4 Before the Court is a motion to consolidate our action with
5 this one filed by the NAACP and others under Federal Rule of
6 Civil Procedure 42(a). The Fifth Circuit has provided that
7 "consolidating actions in a district court is proper when
8 the cases involve common questions of law and fact, and the
9 district judge finds that it would avoid unnecessary costs
10 or delay."

11 Federal Rule 42(a) provides that when actions involving
12 a common question of law or fact are pending before the
13 Court, the Court "'may make such orders concerning
14 proceedings therein as may tend to avoid unnecessary costs
15 or delay.'" The Court has broad discretion in determining
16 whether to what extent to consolidate a case, and Rule 42(a)
17 is designed and intended to encourage consolidation.

18 In this instance the NAACP and coalition cases
19 challenge the same subsection of the same bill, Senate Bill
20 2343 passed this year. Plaintiffs in both suits seek
21 declaratory and injunctive relief, enjoining Commissioner
22 Sean Tindell, who is head of the Department of Public
23 Safety, and Chief Bo Luckey, head of the Capitol Police, in
24 their official capacities, from implementing the consecutive
25 provisions of Senate Bill 2343 that they challenge. So the

1 NAACP challenges Section 1, Subsections 6(a) and (b).
2 Coalition plaintiffs challenge (c). 6(a) and (b) expands
3 the Department of Public Safety and Capitol Police
4 jurisdiction and authority in the city of Jackson, which the
5 NAACP plaintiffs say violates their rights under the
6 Fourteenth Amendment's Equal Protection Clause.

7 (c), which the coalition plaintiffs challenge, grants
8 the Department of Public Safety and Capitol Police, pursuant
9 to the same expansion scheme, a particular authority. It is
10 the authority to prohibit any event on any sidewalk or
11 street next to any property owned or occupied by any state
12 entity or official absent prior written approval from
13 Tindell or Luckey.

14 The coalition plaintiffs similarly allege that this
15 provision, (c), violates the Fourteenth Amendment's Equal
16 Protection Clause. They also allege that it violates their
17 plaintiffs' First Amendment and Fourteenth Amendment rights
18 under the Due Process Clause. The law's effective date is
19 provided in Section 2 of the act. In its entirety it reads,
20 "This act shall take effect and be in force from and after
21 July 1, 2023."

22 The act provides for no exceptions or grounds for delay
23 of that effective date. The legislature could have provided
24 that the law would not go into effect until after DPS had
25 adopted its rule, but it did not. The legislature selected

1 the date, the governor signed the date into law, and the act
2 provides no authority for a state agency to stand in for the
3 legislature and declare a substitute effective date. Come
4 July 1, 2023, protesters in the NAACP and coalition
5 plaintiff groups will be required to obtain prior written
6 approval of defendants Tindell or Luckey prior to speaking
7 on any sidewalk or street next to any property owned or
8 occupied by any state government official or entity.

9 So in a moment, I'll transition to discussing why the
10 coalition and NAACP cases ought to be consolidated
11 specifically under Federal Rule 42(a). However, I'd first
12 like to take a moment to parse the prior permission
13 provision that both plaintiff groups extensively describe in
14 their complaints and allege are unconstitutional, because
15 the plain sweep of the provision, being the sheer breadth of
16 expressive activity it seeks to regulate, is relevant to the
17 discussion of consolidation generally and is relevant to
18 addressing the counterarguments that the State raised to our
19 motion to consolidate.

20 So the permission provision is two sentences in its
21 entirety. As we said, the second sentence requires
22 Department of Public Safety to promulgate rules and
23 regulations to effectuate the first sentence. The first
24 sentence, the prior restraint, reads, "Written approval from
25 the Chief of the Capitol Police or the Commissioner of the

1 Department of Public Safety shall be required before any
2 event occurs which will take place on any street or sidewalk
3 immediately adjacent to any building or property owned or
4 occupied by any official, agency, board, commission, office
5 or other entity of the State of Mississippi." The same
6 written approval shall be required also before any event
7 occurs "which can reasonably be expected to block, impede or
8 otherwise hinder ingress thereto or egress therefrom."

9 So in order to give the second part of that one
10 sentence provision consequence, you have to assume that it
11 does not apply to streets or sidewalks next to government
12 buildings. Otherwise it would be unnecessary. So the
13 second provision applies to any event anywhere which can
14 reasonably be expected to block, impede, or otherwise hinder
15 ingress or egress to any building or property owned or
16 occupied by any official or state entity of the State of
17 Mississippi.

18 So both the NAACP plaintiffs and the coalition
19 plaintiffs have described that provision in detail and
20 allege that it violates their constitutional rights. The
21 provision regulates a substantial amount of protected
22 expression, which cannot be prohibited absent prior written
23 approval by the State, including protests by these plaintiff
24 groups who are often telling the State that they are unhappy
25 with issues of state government while they are standing on

1 traditional public forums like city sidewalks and streets.

2 One more detail about the provision and then I will
3 step back and start addressing factors. The provision
4 contains no included penalty, so it must be enforced the
5 old-fashioned way where protesters who were speaking how or
6 where they weren't supposed to be were charged or arrested
7 by state or local law enforcement who could request proof in
8 this case of the prior written approval on or after July 1,
9 and for those who don't have it, a local prosecutorial
10 entity like a city or county prosecutor or DA would then
11 exercise his or her discretion regarding whether to charge
12 that person with disturbing the peace, disorderly conduct,
13 failure to obey or comply, or a traffic violation. We
14 represent protesters across the state of Mississippi in
15 infractions related to protesting, and those are generally
16 basket of laws that relate to arresting protesters. So
17 disturbing the peace.

18 One of the ways that Section 6(c) is related to 6(a)
19 and (b), which the NAACP plaintiffs challenge, is that 6(a)
20 and (b) specifically provides new and expanded arrest
21 authority to DPS and the Capitol Police to arrest for what
22 are typically protest-related crimes. It says disturbing
23 the peace and traffic ordinances. So 6(a) and (b) interlock
24 with 6(c), because noncompliance with 6(c) while it can be
25 enforced by local law enforcement citywide, it's only

1 through 6(a) and (b), challenged by the NAACP plaintiffs,
2 that Capitol Police can arrest for protest-related
3 violations, like traffic ordinance violations and disturbing
4 the peace, and it is only through 6(a) and (b) that the
5 Capitol Police can do so outside of the CCID.

6 So, again, it's not necessary that Capitol Police be
7 enforcing this provision. Local law enforcement can do it.
8 Local prosecutorial entities have the discretion to charge
9 people for not having prior written authorization, but
10 because 2343 is a law which expands the authority of
11 Department of Public Safety and Capitol Police, 6(a), (b),
12 and (c) all work in tandem.

13 Because of the material overlap in our cases, the NAACP
14 plaintiffs do not oppose consolidation. Contrary to what
15 the State has argued, NAACP plaintiffs have never taken the
16 position that the prior written permission provision does
17 not go into effect on July 1. And we refer the Court to
18 paragraph 122 of their complaint.

19 Second, contrary to what the State has argued, the
20 NAACP plaintiffs have not abandoned the potential for
21 bringing a First Amendment claim, just as they have not
22 abandoned their Capitol Police expansion claim.

23 THE COURT: But the NAACP counsel have not filed an
24 amendment to their complaint to bring in any such attack;
25 isn't that correct?

1 MS. WU: Correct. And --

2 THE COURT: And as it stands right now, the complaint
3 from the NAACP only contains matters of discrimination, but
4 it does not contain a pure First Amendment claim; am I
5 right?

6 MS. WU: Your Honor, they do not allege in their claims
7 a pure First Amendment claim, but they describe for many
8 pages in their complaint the provision, and they allege,
9 either factually or legally or in a mixed manner, that it
10 does violate their plaintiffs' First Amendment rights. By
11 "non-abandonment," what we mean is there is a procedural
12 path, and it would require permission for them to amend
13 their complaint and add in a First Amendment claim. So it
14 is not therefore abandoned, and there is still the potential
15 for them adding that claim.

16 THE COURT: But the NAACP plaintiffs have waited past
17 the time period where they could amend their complaint as a
18 matter of right, and now in order to amend, they have to get
19 the Court's approval.

20 MS. WU: Certainly, Your Honor.

21 THE COURT: And so they didn't do it when they could
22 have done it as a matter of right. Furthermore, the NAACP
23 plaintiffs have stated in their papers that they did not
24 seek any relief under the second statute at that time, and
25 they have not come back to the Court and said that they are

1 seeking any relief under that statute.

2 MS. WU: So I think it's helpful here to -- for us to
3 step back, and you tell me if you want me to step forward
4 again, but to step back and say that the standard for
5 Rule 42(a) is not that the plaintiffs bring ident- -- I'm
6 sorry, not that all parties bring identical claims but that
7 they share common questions of law and fact.

8 THE COURT: There are about seven factors or so -- I
9 might be wrong on the number, but there are various factors
10 that the Court is instructed to examine in these type
11 matters to ascertain whether matters should be combined,
12 consolidated, and both sides here have discussed these
13 factors with varying conclusions. In fact, the defense
14 contends there is only one factor which would warrant
15 consolidation, whereas in your papers you have contended
16 that all such factors under the pertinent case law speak
17 heartily in favor of consolidation.

18 So there is definitely a difference of opinion as to
19 the impact of these various factors. So you need not
20 discuss the very first one, which is whether these two
21 matters both are in the same court, because they definitely
22 are, but then after that there is total disagreement as to
23 the impact of the factors on this aspect of consolidation.

24 Now, one of the key points raised by the defense is one
25 I just mentioned, is that the NAACP in its papers has never

1 attacked the statute in the manner in which your clients are
2 attacking the statute; that is, based on First Amendment
3 grounds. The NAACP has not attacked the statute at all on a
4 First Amendment ground but instead have waged their attack
5 on matters of purported discrimination. So you can start
6 off from there and tell me then how they have common issues
7 of law, for instance, and then we will get to some of the
8 other various factors, but I will let you pick how you want
9 to proceed thereafter.

10 But let's start on the common issues of law. Okay?

11 MS. WU: Yes, Your Honor.

12 THE COURT: Okay. Now, has my question moved you
13 further afield beyond some pertinent facts that you wanted
14 to provide to the Court? If so, I want to hear your
15 argument on these other matters you considered to be
16 pertinent. So have I done that? If so, then you can move
17 backwards and cover those facts. Okay?

18 MS. WU: Yes, Your Honor. I will flag and I'll come
19 back to those, but I want to first address what you asked,
20 which is: What are the common questions of law or fact?

21 So I would direct Your Honor to pages 7 through 8 of
22 our memorandum in support of our motion for consolidation.
23 We have a table which provides paragraph citations to places
24 where the NAACP plaintiffs and the coalition plaintiffs are
25 alleging the same facts or they're making similar arguments

1 regarding law. I won't repeat all of those here, but I will
2 just summarize.

3 THE COURT: No, don't summarize. I want you to repeat,
4 because counsel opposite contends that some of your
5 submissions are not comporting with the actual complaints or
6 with the actual facts of this litigation. So let's just
7 take your time and go through each one. We have plenty of
8 time. Okay?

9 MS. WU: Thank you, Your Honor. For example, both
10 suits allege that the prior permission section, 6(c),
11 suppresses primarily political speech in traditional public
12 forums. That's the coalition complaint at paragraph 17 and
13 the NAACP complaint at paragraph 104. Both complaints
14 allege that expressive activities in which plaintiffs have
15 engaged in the past and which they plan to engage in the
16 future would be made illegal by the provision. That is
17 coalition complaint at paragraph 16 through 21 and NAACP
18 complaint at paragraphs 123 through 26.

19 Both suits allege that the prior written permission
20 requirement does not give adequate warning of what
21 activities it prescribes, nor does it set forth explicit
22 standards for those who must apply it. That's coalition
23 complaint at paragraph 25; NAACP complaint, paragraphs 123
24 and 128.

25 Both complaints allege that the law substantially

1 encompasses expressive activities that the State does not
2 have authority to regulate through imposition of a prior
3 restraint. That's coalition complaint at paragraph 19,
4 NAACP complaint at paragraph 123.

5 And I want to --

6 THE COURT: But now you state that as though the NAACP
7 complaint announces these matters as though the NAACP is
8 seeking some sort of relief from those matters. But the
9 NAACP is not seeking a relief based on those. Those are
10 just background facts that the NAACP submitted in its
11 complaint, but there is no submission for asking for a
12 remedy for that. There is no claim. So even though it is
13 mentioned, as I said before, there is not a claim that is
14 submitted to this Court asking for a remedy to those
15 observations.

16 MS. WU: So, Your Honor, I would argue that 42(a), the
17 federal rule, does not require common claims. And also
18 Local Rule 42(a) -- I'm sorry, Local Rule 42 simply requires
19 that cases under 42(a) can seek consolidation by filing a
20 motion before the judge of the first filed case. In this
21 instance, we believe we have satisfied 42(a), and I want to
22 give an example of why we don't have to have the same claims
23 as NAACP in order to satisfy the standard of having a common
24 question of law or fact which --

25 THE COURT: Now, I want to let you get into that, but

1 I'm just making sure that the record is clear that even
2 though you are talking about this identity in some
3 respects on a background allegation of facts, that you are
4 not requesting in -- for your plaintiffs any specific --
5 excuse me. The NAACP was not requesting any sort of relief
6 based on that.

7 MS. WU: Not at this time.

8 THE COURT: Well, now, there's the next question I
9 have. Because I have not seen anything in any pleading, any
10 filing, which indicates that NAACP intends to seek amendment
11 of its complaint. Are you saying that there is such?
12 Because in the NAACP complaint, the plaintiff therein stated
13 specifically that they were not at that time, which now is
14 going to be at this time, not asking for any remedies under
15 the First Amendment.

16 So what is your understanding of what the NAACP intends
17 to do?

18 MS. WU: So our function in discussing the NAACP's
19 non-abandonment of its claim is not to suggest we know more
20 about the NAACP than Your Honor does. We certainly do not.
21 However, the factor test for 42(a) asks for the potential,
22 what is the potential for inconsistent adjudication; what is
23 the potential for conflicting factual findings?

24 Certainly in a case like this where there is the
25 procedural potential for an amendment that's the same claim

1 as the one we have against the same the law and the same
2 defendants seeking the same relief, that that's something
3 that we need to raise before Your Honor, because if this
4 case does not get consolidated, we end up before two
5 different judges, and they are able to or do wish to amend
6 their complaint, now we have two different courts
7 adjudicating the same subprovision, the same law against the
8 same defendants, and that could result in conflicting
9 adjudications. So for that reason, we have to raise the
10 potential under the factor of what is the potential for
11 conflicting adjudications?

12 THE COURT: Well, tell me what would be the relevance
13 in your case on matters of alleged discrimination?

14 MS. WU: Your Honor, we do not -- we do not require any
15 evidence of racial discrimination. We are not -- it's not
16 required in order to prevail.

17 THE COURT: That's what I am -- that's why I asked the
18 question, because you're saying there's potential for
19 conflict. So then when we look at the necessary elements to
20 be proved in each one of the two cases, they are different.
21 NAACP has to prove matters of discrimination. You don't.
22 You have to prove some other elements of First Amendment
23 violations that would not be elements before the NAACP on
24 the matter of discrimination. So it would seem that the
25 elements of the two claims are different, and while there

1 might be some discussion of them, but there is no request
2 for remedy from either side of the matters being touted by
3 the second party. So how would that render a potential for
4 conflict?

5 MS. WU: Your Honor, if -- our assumption was based on
6 the text of the complaint, which multiple times mentioned
7 First Amendment rights and free speech rights, that if the
8 plaintiffs did amend, they would include a First Amendment
9 claim and that their First Amendment claim would be
10 different from their current pending Fourteenth Amendment
11 race discrimination claim. So the potential for conflicting
12 adjudications or conflicting factual assessments of
13 simultaneous First Amendment claims challenging the same law
14 as to the defendants seeking the same relief, that that
15 could potentially happen. Those would not have different
16 standards. They would be both be alleging First Amendment
17 violations.

18 THE COURT: Would that be a factor of any grit for this
19 Court to consider when your argument is -- is that the other
20 plaintiffs could amend their claim --

21 MS. WU: Yeah.

22 THE COURT: -- when they have not done it, when they've
23 had an opportunity to do it, when they could have done it as
24 a matter of course without court approval and now, in order
25 to amend, they would need court approval, and as the papers

1 now stand from them, they stated that at this time they have
2 no intention to challenge your statute on First Amendment
3 grounds? So are you saying that I can still consider this
4 factor as being a salient factor when the plaintiffs in the
5 other cases have said we have no interest right now in
6 adopting a First Amendment claim?

7 MS. WU: So as Your Honor knows, we have alleged that
8 eight factors weigh in favor of consolidation. The
9 information that we are providing about the potential for
10 conflicting adjudications goes to one of those. So I can
11 talk about the other seven.

12 THE COURT: Okay. But I want to stay on the one that I
13 just mentioned, and that is the common questions of law. So
14 I want to know is there any other argument under that
15 particular factor where you are contending that there is a
16 common question of law here or common cause here? So is
17 there something else you want to tell me about? Mr. Johnson
18 has some notes for you.

19 MS. WU: My colleague wanted to raise that the NAACP
20 memo -- I'm sorry. Pardon me. The State's response in
21 opposition to our motion --

22 THE COURT: Well, why don't you go back there and just
23 talk to him for a moment.

24 MS. WU: I'm sorry. I got it.

25 THE COURT: Go ahead. No, no.

1 MS. WU: I had a failure of bifocals. I'm sorry.

2 THE COURT: That's okay.

3 MS. WU: I got it now.

4 THE COURT: If you don't, just go back and talk to him.
5 I'm good. I told you we have plenty of time.

6 MS. WU: I think I got it. Cliff is very astutely
7 pointing out that the quotation from the NAACP complaint
8 that you're referring to at page 5 is, quote, "Plaintiffs do
9 not at this time pray for any relief with respect to that
10 provision," end quote. So the terms "at this time" if you
11 are giving the ordinary plain meaning to that sentence, it
12 must mean that at a later time. Plaintiffs --

13 THE COURT: No, I can't go that far.

14 MS. WU: Huh?

15 THE COURT: I can't go that far. I can't read more
16 into what's on the page. It just simply says that -- it
17 says to me that this is the complaint which has set out our
18 causes of action and one cause of action that we are noticed
19 on, because we have word about another complaint addressing
20 the same statute, which potentially could have a First
21 Amendment claim, we do not intend to pursue. So that is all
22 I have, and I can't go any further than that other than to
23 say that the plaintiffs in the other case have said we do
24 not intend to pursue a First Amendment claim, period. And I
25 have not seen anything from the other plaintiffs which says

1 anything differently at this point.

2 MS. WU: So, Your Honor, my aim is to convince you that
3 taken as true, that we still satisfy 42(a) without the NAACP
4 plaintiffs amending their complaint to raise an identical
5 First Amendment claim, which they could with Your Honor's
6 permission. Let's assume --

7 THE COURT: Well, they haven't asked for it yet.

8 MS. WU: Correct.

9 THE COURT: There has been nothing submitted to me on
10 that.

11 MS. WU: Yes, Your Honor. So I am going to proceed in
12 this argument assuming that they don't do that, and I am
13 going to give you other ways in which we share common
14 questions of law and fact.

15 THE COURT: Okay. Well, yes, give me other instances
16 on common questions of law. So what is the other common
17 question of law?

18 MS. WU: So Senate Bill 2343 broadly expands the
19 jurisdiction of Department of Public Safety and the Capitol
20 Police to enforce laws and increase their arrest authority
21 within the city of Jackson. We have explained that our
22 position is that this written permission requirement
23 interlocks to some extent with (a) and (b) because it --
24 while local law enforcement can enforce throughout the city
25 of Jackson, this Section (c), the prior written permission

1 complaint, DPS and Capitol Police can only enforce it if (a)
2 and (b) pass. So we have provided that there is
3 interlocking 6(a), (b), and (c) provisions, and also we --
4 our position is that the Court's familiarity with S.B. 2343
5 and its background will be helpful in resolving the issues
6 of our case alongside their case and lead to greater
7 judicial efficiency, will allow all of these to be resolved
8 by same by the judge. Efficiency's a very important factor
9 in the consolidation evaluation.

10 And additionally, common questions of law or fact. In
11 cases that we have looked at, we have never seen the
12 microscope so pushed in to what qualifies as common as to
13 say the same level of scrutiny, as to the same
14 constitutional amendment, as to the same clause is what
15 defines "common." In many cases "common" can include
16 constitutional claims. "Common" can include Fourteenth
17 Amendment claims. We have common claims that are medium
18 zoomed in: Equal protection, Fourteenth Amendment claims.
19 We have different levels of scrutiny, but we would argue
20 that that is asking too much of the standard for what is a
21 common question of law or fact. So we think the fact that
22 we both bring Fourteenth Amendment equal protection claims
23 qualifies -- against S.B. 2343 qualifies as a common
24 question of law.

25 With regard --

1 THE COURT: But you are submitting your Fourteenth
2 Amendment matter in different perspectives, though.

3 MS. WU: Yes, Your Honor. And -- yes. I don't want to
4 get into the merits.

5 THE COURT: But let me ask you another question.

6 MS. WU: Yes.

7 THE COURT: Let me ask you another question on this,
8 one that you probably are going to get to, but you haven't
9 gotten to it yet. I know you got a lot of ground to cover.
10 But on your statute and your claim on First Amendment
11 grounds, are you asking the Court to declare that the entire
12 statute is unconstitutional?

13 MS. WU: Yes, Your Honor. We have --

14 THE COURT: The entire statute.

15 MS. WU: Oh, no, Your Honor. Pardon me. No. Just the
16 two sentences.

17 THE COURT: Yeah. You're only asking that a portion of
18 the statute be declared unconstitutional; is that correct?

19 MS. WU: Correct.

20 THE COURT: So you're not asking for a finding of
21 unconstitutionality across the full body of the statute?

22 MS. WU: Yes, sir. Correct.

23 THE COURT: What about the NAACP's claim in the other
24 matter? How do you read that, whether they are asking that
25 the entire statute be declared unconstitutional?

1 MS. WU: Your Honor, I -- I -- I do not feel like I am
2 qualified to answer that question. I'm sorry.

3 THE COURT: Well, from your reading of their
4 complaint -- you read their complaint; correct?

5 MS. WU: I did, Your Honor. I --

6 THE COURT: And even though you have not studied it as
7 deeply as you could, you don't mind giving me a fresh
8 perspective on it, do you?

9 MS. WU: Your Honor, I truly fell out of my depth
10 opining about what the NAACP plaintiffs are requesting.

11 THE COURT: But you did read the last paragraph or two
12 in their complaint of their prayer for relief.

13 MS. WU: I did, Your Honor.

14 THE COURT: And so do you recall anything in their
15 request for relief where they asked me to declare that the
16 entire statute should be deemed unconstitutional, from what
17 you read? I am not asking you to make any interpretation.
18 I am just asking for what you read. And so just call on
19 that storehouse memory that you have and ask me if there's
20 anything therein that you read that said in their relief
21 they want a declaration of unconstitutionality as to the
22 entire statute.

23 MS. WU: Your Honor, my recollection at this moment
24 regarding their enumerated prayer for relief is to declare
25 the portion of the statute that expanded jurisdiction and

1 arrest authority unconstitutional, but I -- I may be
2 misremembering.

3 THE COURT: But, now, in your attack, you are not
4 asking for a broad sweeping declaration of
5 unconstitutionality, are you?

6 MS. WU: Correct.

7 THE COURT: You are only attacking the First Amendment
8 matter; correct?

9 MS. WU: Correct.

10 THE COURT: And that's it. Otherwise you are saying
11 the rest of the statute can go into effect; is that so?

12 MS. WU: Yes. We are only challenging two sentences.

13 THE COURT: Just two sentences out of the whole thing.

14 MS. WU: Yes, Your Honor.

15 THE COURT: And so the rest of the NAACP's challenge to
16 their particular statute, you have actually no quarrel with
17 that either, do you?

18 MS. WU: Could you -- could you --

19 THE COURT: Well, on their discrimination claim. You
20 are not alleging any discrimination.

21 MS. WU: We are not alleging racial discrimination. I
22 want to, if it's okay with Your Honor, zoom out for a moment
23 and talk about the Equal Protection Clause's tiers of
24 scrutiny with regards to our parallel allegation. So my
25 understanding is the NAACP says strict scrutiny ought to be

1 applied to these jurisdictional expansion provisions because
2 there is intentional discrimination. For us, with regards
3 to our equal protection parallel claim with our First
4 Amendment -- we have a parallel equal protection claim
5 saying intermediate scrutiny applies to Subsection (c) which
6 we challenge because the government won't be able to meet
7 its burden, and for a speech restriction, the government has
8 the burden to prove it has an adequate purpose. So in order
9 to regulate speech, it needs -- if it's a facial -- facially
10 content-based restriction, the government has to meet First
11 Amendment strict scrutiny, which requires a compelling
12 government purpose.

13 If Your Honor does not agree with us that it is a
14 content-based restriction, then we go to intermediate
15 scrutiny, where the government still has the burden to prove
16 that its purpose in regulating speech in this way is
17 substantial. So we argue that we are ready to -- we are
18 ready to make the argument that based on the law as it
19 stands now, with no further rules or regulations
20 promulgated, the government cannot meet its burden to prove
21 that the provision is constitutional.

22 So zooming out, at the level that we argue the Court
23 ought to zoom out given the plain language of 42(a) and
24 given the case law which interprets it, we don't think we
25 should be in the weeds at level-of-scrutiny differences. We

1 believe that we should be talking about a common question of
2 law or fact. To satisfy 42(a), we don't need both. So we
3 think, for example, a common question of law is: Does the
4 State have an adequate or permissible purpose when it passed
5 2343? That encompasses both of our claims and it
6 encompasses both of our legal theories. So that's a common
7 question of law.

8 THE COURT: But this discussion that you just
9 mentioned, which you covered quite well in your brief, by
10 the way, as to the different type of scrutiny that the Court
11 should utilize, and utilize in examining a potential
12 violation of First Amendment, would not come up in the
13 discrimination case, though, will it?

14 MS. WU: It would not. If Your Honor would allow me to
15 give one example of a previous motion for consolidation that
16 the Attorney General brought in another matter that has
17 similar differences, not the same but similar differences, I
18 think it could be instructive.

19 In 2018, a second case was filed challenging the felony
20 disenfranchisement scheme in Mississippi whereby people with
21 particular convictions lose their right to vote for life.

22 *Hopkins versus Hosemann* was filed in 2018, and *Harness*
23 *versus Hosemann* was filed in 2017. The Attorney General
24 moved for consolidation of those cases. Consolidation was
25 ordered by Judge Jordan because of the following

1 similarities: required examination of the Mississippi
2 Constitution. One similarity we think that we have in the
3 NAACP case. In that --

4 THE COURT: Keep your voice up, please.

5 MS. WU: Hmm?

6 THE COURT: You kind of drop your voice at the end.

7 MS. WU: Oh. Like Judge Jordan pointed out in his
8 order consolidating the cases, the commonality between these
9 two different cases challenging the felony
10 disenfranchisement scheme was that they required examination
11 of the Mississippi Constitution. That was a similarity. So
12 we think between the coalition case and the NAACP case, this
13 requires that -- S.B. 2343 requires examination of the
14 federal constitution.

15 So one of the other similarities in that matter was
16 whether Secretary Hosemann should be enjoined from enforcing
17 the contested provision of the Mississippi Constitution. So
18 here, Your Honor, we are seeking to enjoin the same state
19 officials in their official capacity from their enforcement
20 responsibilities in 2023.

21 We believe that Judge Jordan's analysis of similarities
22 between the cases saying these are similarly situated
23 plaintiffs, they have both been convicted of felonies, lost
24 their right to vote, and served their time, similarly, we
25 think that the coalition and NAACP plaintiffs are similarly

1 situated. These are advocacy organizations and individuals
2 who have in the past protested and will in the future, and
3 their protest activities will be prohibited by the prior
4 written permission provision.

5 And consolidation in that matter was ordered despite
6 the following differences: The plaintiffs were different
7 people with different attorneys and that *Hopkins* and *Harness*
8 actions challenged different provisions of the Mississippi
9 Constitution under different legal theories. It was
10 undisputed by the parties that they brought seven completely
11 different legal claims in that case and that substantially
12 different relief was sought.

13 A direct quote from the AG's motion for consolidation
14 of those two cases is, quote, "Like this suit, the *Hopkins*
15 suit" -- this was filed a year later -- "challenges
16 Mississippi's felon disenfranchisement laws, seeks
17 declaratory and injunctive relief against Secretary
18 Hosemann. The lawsuits are in virtually the same procedural
19 posture, share common questions of fact and law, and
20 consolidating the cases would avoid unnecessary costs and
21 delays. Those and all other factors favoring consolidation
22 under Rule 42(a) and Local Rule 42 are satisfied."

23 We would argue that even though we have separate legal
24 theories and we are challenging different provisions of
25 2343, like the *Hopkins* and *Harness* plaintiffs, we are

1 challenging a similar scheme, we're seeking the same relief,
2 we're suing the same people, we're in virtually the same
3 procedural posture. We do share common questions of fact or
4 law if Your Honor agrees with us that we're not supposed to
5 zoom in to the microscope level, and consolidating the cases
6 would avoid unnecessary costs and delay.

7 THE COURT: You would agree with me that whether
8 consolidation is ordered is a fact-intensive scrutiny?
9 Would you agree with me on that? That it's fact-intensive?

10 MS. WU: The NAACP's claim is fact-intensive.

11 THE COURT: No, no, not the claim.

12 MS. WU: Oh.

13 THE COURT: I'm saying that the inquiry relative to
14 consolidation is fact-intensive, that the Court needs to
15 look at the cases purportedly in the same bailiwick so as to
16 counsel consolidation, that that in essence is a
17 fact-intensive inquiry. The Court has to look at both
18 complaints to see then is there similarity relative to law,
19 relative to facts, has to look at other matters that you
20 mentioned in your discussion of Judge Jordan's case as to
21 what posture these cases are in, *et cetera*, whether they
22 have common plaintiffs, whether they have common lawyers,
23 *et cetera*, that those are matters that the Court needs to
24 look at in each case.

25 So while you've taken me through that particular

1 consolidation matter, my question is -- is: Since this
2 question is fact-intensive, what precedent is that for this
3 question before me when I have to look at the facts that are
4 generated by this particular matter, not just look at some
5 generalized statements of law but be able to look at the
6 common questions that are generated by these various
7 inquiries?

8 So what I'm saying is I would rather get back to the
9 inquiries generated by these cases and where we are and just
10 to cite to me some cases that have dealt with consolidation
11 and even approved it might not have any precedential value
12 if the facts are not the same. And this matter here that
13 was talking about disenfranchisement is a totally different
14 issue, and you didn't say not one time that this whole issue
15 on disenfranchisement had completely different elements of
16 proof, such as what we have here.

17 So I would rather get back to these matters where I
18 have a First Amendment claim in one instance and in another
19 one I have a discrimination claim. The factors that are
20 necessary to prove each one are different. And so I then
21 want to know, how then should I hold that there should be a
22 consolidation of these factually different claims? And I
23 recognize that in examining all of the factors of the
24 pertinent case law, that the courts have stated there not be
25 absolute identity, that it doesn't necessarily have to

1 satisfy every last factor, but nevertheless, I need to have
2 enough factors satisfied so that it saves the Court
3 resources, it means that one judge should handle the matter
4 instead of two to prevent the possibility of conflicting
5 judgments, it means that the Court needs to look at the
6 plaintiffs in each case to see whether one set of plaintiffs
7 would be prejudiced by such consolidation where the issues
8 of law might be so varied between the two cases.

9 These are the things that are fact-intensive that have
10 to be viewed in this matter. And so while I appreciate
11 hearing about the consolidation in other cases, nevertheless
12 I would prefer that we stick to the facts here in this case
13 so that I can see if there is a potential marriage of those
14 two cases that should go forward from henceforth. If not,
15 then they need to be in separate ceremonies, and so we go
16 from there.

17 Now, so let's go back to the plaintiffs. The
18 plaintiffs here are different; correct?

19 MS. WU: Yes, Your Honor.

20 THE COURT: Okay. The defendants are different; that
21 is, the two defendants in your case are also in the
22 discrimination case. But the discrimination case has five
23 other defendants in it; correct?

24 MS. WU: Yes, Your Honor. And the standard is not
25 identical parties. The standard is common.

1 THE COURT: Yes. We can go with that. So then we have
2 two defendants --

3 MS. WU: In common.

4 THE COURT: -- that are common.

5 MS. WU: Yes.

6 THE COURT: But are those two defendants that are
7 common key defendants in both instances? I know they are in
8 yours because all you have are two defendants, but what
9 about the other case, discrimination case? What role will
10 those two defendants play in a discrimination case and
11 whether that role will be of such substance that that should
12 say something about a marriage? So talk to me about that.

13 MS. WU: Your Honor, my impression of an NAACP case is
14 that the roles of Commissioner Sean Tindell and Chief Bo
15 Luckey are as important and critical in enjoining in order
16 to stop the operation of the statute should the plaintiffs
17 prevail in proving that those provisions violate their
18 plaintiffs' constitutional rights. So they are -- in our
19 case those are -- those parties are essential, and my
20 impression of the NAACP's case is that those parties are
21 essential because their primary attack on 6(a) and (b),
22 which is the expansion of authority, is the expansion of
23 Department of Public Safety's authority via Commissioner
24 Tindell and the expansion of the Capitol Police's authority
25 via Bo Luckey. Those are the same two, the only two,

1 officials who also implement 6(c), which we challenge. So I
2 would say not only are they both essential parties in both
3 cases, but we are suing them for their role in implementing
4 the selfsame scheme when the scheme is looked at from the
5 level of expansion of DPS and Capitol Police authority in
6 the city.

7 THE COURT: What is the potential that findings of fact
8 concerning the activities of these two defendants in your
9 case who are common in the discrimination case, that
10 findings of fact could have an impact adverse to the
11 discrimination case since the two defendants are the same in
12 both? The two defendants are. And ordinarily, in my jury
13 trials, I prefer -- if it's a jury trial; if it's a bench
14 trial, I do the same thing -- prefer to have interrogatories
15 to indicate more precisely what the Court's opinion is or
16 what the Court's determination is.

17 So in the Court's findings of fact as to those two
18 defendants in your case, as to those two defendants in the
19 discrimination case, is there a potential that a trier of
20 fact could reach different conclusions as to what their
21 activities were?

22 MS. WU: Your Honor, I am thinking. Sorry.

23 (An off-the-record discussion was held.)

24 MS. WU: If the Court were to find that those officials
25 lacked a racially discriminatory intent on the NAACP's case

1 side, it would not necessarily prejudice the coalition
2 plaintiffs. If the Court were to determine as to the
3 coalition plaintiffs that those state officials lacked or
4 did not lack a substantial or compelling governmental
5 purpose in passing the protest provision, that does not go
6 directly to the question that the NAACP plaintiffs will have
7 regarding those officials regarding racial discrimination.

8 Let me check with my team really fast to make sure I --

9 THE COURT: Go right ahead. One second. Let me just
10 give you one other little nugget to take with you.

11 On matters such as this, courts look at whether there
12 is a res judicata effect, for instance, with a finding in
13 one case that would poise some res judicata effect. Well,
14 were the parties or not altogether identical, then the
15 courts look at whether there is something some called
16 collateral estoppel, which is a different kind of issue
17 preclusion. So the question boils down to whether a
18 determination by a fact finder in either one of the cases
19 would serve as some sort of issue preclusion in the other
20 case as to any defendant that's common to both.

21 Now, I tell you what I'll do. We've been at it for a
22 moment. You've been standing there. So I'm going to
23 declare a recess, 15 minutes, and then you can discuss with
24 your team how you all feel about that and anything else you
25 want to bring forward to me. I am not limiting you in any

1 fashion, because I know you have some other factors you want
2 to discuss with me. You've already stated that you don't
3 have to satisfy all the factors of those cases but that you
4 can satisfy enough to persuade the Court that there should
5 be a consolidation. So anything else you want to brush up
6 on and be able to talk to me about, I want to hear it.

7 Okay?

8 MS. WU: Thank you, Your Honor.

9 THE COURT: So let's make it about 20 minutes.

10 MS. WU: Thank you, Your Honor.

11 THE COURT: We're in recess.

12 (A recess was taken.)

13 THE COURT: I am going to take a matter now out of
14 turn. So I will come back to this, because I had some more
15 questions. And in addition on this same point of our
16 consolidation issue, I might want to hear from counsel for
17 the other case, Mr. Rhodes. And because I have mentioned
18 him several times and what he put in his complaint and so
19 then I -- not might have, but I do have some questions here.
20 The defense also has to make its response. So we have a lot
21 of other ground we need to cover.

22 In the meantime, I might be able to handle something
23 quicker, and that is the matter concerning the Chief
24 Justice. He might need to get back to court. And so let me
25 hear that motion from the Chief Justice and see then if I

1 can resolve that.

2 MR. NELSON: May it please the Court, Mark Nelson for
3 the Chief Justice.

4 THE COURT: You filed some papers in this matter.

5 MR. NELSON: I did. Yes, sir.

6 THE COURT: And those papers essentially are asking
7 that I determine to file a final judgment in the matter
8 concerning the ruling I made on this matter of judicial
9 immunity.

10 MR. NELSON: Yes, sir.

11 THE COURT: And there are reasons why you would like to
12 have me put in a final judgment on that action, because then
13 it would open up other possibilities. So then go ahead and
14 make your motion.

15 MR. NELSON: Yes, sir. For the Rule -- addressing
16 the Rule --

17 THE COURT: And keep in mind that I have read your
18 papers.

19 MR. NELSON: Thank you, Your Honor.

20 THE COURT: But still for the record, I want to make
21 sure that you feel satisfied that you are rendering the
22 background facts and your arguments therefrom. And take
23 your time, because we are going to lunch in about an hour,
24 and we should be finished with this in about an hour, I'm
25 hoping.

1 Now, go ahead on.

2 MR. NELSON: Thank you, Your Honor. On the June 9th,
3 we filed on behalf of the Chief Justice in his official
4 capacity a motion asking for a Rule 54(b) certification.

5 THE COURT: Now, speak directly into the microphone,
6 please.

7 MR. NELSON: How is that? Better? I'm a little taller
8 than the microphone, but that's okay.

9 (An off-the-record discussion was held.)

10 THE COURT: Okay.

11 MR. NELSON: Thank you, Your Honor. If I may, if it
12 pleases the Court, essentially, Your Honor, we would like
13 this Court to enter a Rule 54(b) certification of finality
14 to certify this case against the Chief and the Chief only
15 pursuant to your order of June the 1st as being a final
16 appealable order. There are some hoops that the Court needs
17 to jump through that's talked about in the motion, but the
18 primary reason for the motion, Your Honor, is the
19 continuation of more and more attempts to drag the Chief
20 back into the litigation.

21 We have pending before Your Honor what purports to be a
22 motion for clarification. And, Your Honor, I was just taken
23 back when I saw it. Rule 7 makes the provision in the
24 Federal Rules of Civil Procedure that the motion must put
25 forth the reasons for the motion, be in writing, and request

1 the Court to enter an order and specify with specificity the
2 relief sought. None of that in the motion for
3 clarification. It sounds like a Faulknerian stream of
4 consciousness statement that we don't like the order.

5 There is no provision in the federal rules for a motion
6 for clarification. This is nothing more than a Rule 59 and
7 Rule 60 motion for reconsideration because the plaintiffs do
8 not like the result. Your Honor, just as Shakespeare said,
9 a rose by any other name is still a rose, and in this case a
10 motion for clarification is still a Rule 59 and Rule 60
11 motion, so they've used up their final barbs in this case,
12 and we want it put it to an end so that we can have finality
13 on behalf of the Chief Justice.

14 And the reason I say all of that, the two motions are
15 very, very interrelated. Judge, this is -- Your Honor, I
16 know that you have said this before, and I want to
17 emphasize, this is a very consequential case that concerns
18 the Chief Justice, separate and apart from the
19 constitutionality claims. Those are consequential also. I
20 think it's a very serious matter for someone to allege that
21 their constitutional rights are being violated, they're
22 being discriminated against because of race or any other
23 reason, or any other protected class that has been pushed
24 down by the majority.

25 Your Honor, this is not about Mike Randolph. This is

1 about the Chief Justice in his official capacity, but it's
2 also beyond that. It's about the sanctity of the judiciary,
3 Your Honor. It's about stopping the constant attack on the
4 judiciary that's being perpetrated here in this case. This
5 infringes on the business of the Chief Justice. The Chief
6 Justice and I have had to spend countless hours together
7 reading cases about this and drafting up memorandums.

8 Today, for example, we have in the state court proceeding an
9 appeal brief due. The Supreme Court of Mississippi has
10 entered an expedited treatment of the case, an expedited
11 briefing schedule, and our brief is due today, so my partner
12 and son is back in Hattiesburg finalizing that, and we'll
13 get it filed timely today.

14 But meanwhile, we're drug back into this court with
15 some type of motion that's asking for nothing. Now, it's
16 clear to me, Your Honor, that any reasonable person reading
17 the Court's June the 1st order would know that the Chief
18 Justice is dismissed and he's no longer a party to this
19 case. The only thing that he can be a party to in this case
20 are the circumstances on which an appeal may or may not be
21 taken and postjudgment rulings, such as a Rule 59 motion or
22 a Rule 60 motion, which is basically what this is.

23 Now, Your Honor, it's clear under my reading of the
24 Court's order that there were to be no further proceedings
25 concerning any liability of the Chief Justice, that all

1 claims against the Chief Justice were dismissed for the
2 reasons set forth in this Court's very thorough ruling. It
3 is very obvious Your Honor spent a great deal of time
4 writing that memorandum opinion, and I have no complaints
5 about it, Your Honor, since we won. You granted the motion
6 to dismiss was the final result, and that dismissal asked
7 for dismissal with some finality.

8 If this Court doesn't grant some type of order to bring
9 to bear the finality of this matter, then we can be
10 wallowing in this for the next couple years. For example,
11 the motion to consolidation, the Chief sat and very
12 patiently listened to it and was reading the complaint in
13 our case and seeing what it had to do with the other case.
14 We don't take a position on the motion to consolidate, Your
15 Honor, because my client is no longer a party to either --
16 to the litigation. He was never named in the coalition's
17 case. He was named by the NAACP, and Your Honor's chosen to
18 dismiss the Chief, and that's where it should be.

19 Your Honor, this is nothing more than a rejection of
20 Your Honor's ruling. I don't want to say that it's
21 contentious, but it darn near gets close, Your Honor.
22 Without the Chief Justice, this Court, just like the Court
23 said on June the 1st, all relief requested by the NAACP in
24 this case and the other plaintiffs in this case can be
25 rendered by the relief in the absence of the Chief Justice,

1 Your Honor. There's no prohibiting this Court from entering
2 a declaratory judgment declaring 1020 unconstitutional, and
3 if that's what the Court rules, so be it, and that's what --
4 this Court can do that without the Chief Justice being
5 present.

6 If I may, Your Honor, I don't want to get riled up
7 about the case. I want to slow down a little bit, and I
8 want to state the following things that may or may not be in
9 the briefing or in the papers. There's no necessity for
10 having the Chief Justice present today or as a party to any
11 of these lawsuits.

12 Now what we have is that -- well, let's see. Under the
13 law of 1983, 42 USC 1983, we have to have some type of
14 declaratory relief against the Justice. Your Honor, the
15 complaint sought no declaratory relief against the Chief
16 Justice. That's all detailed in the papers. There's
17 nothing in this order that Your Honor entered that the Chief
18 Justice would somehow remain a party as some type of nominal
19 position to be able to stop him from entering an order.
20 This is not a *quasi* dismissal, Your Honor.

21 The unsupported allegations that the Chief Justice
22 would somehow violate someone's constitutional rights is
23 abhorrent, Your Honor, and it's contrary to law, because the
24 law provides that the Chief Justice would assume -- it is
25 assumed that the Chief Justice would follow the

1 constitution, which is his intent to do so. There's no
2 claim against the Chief Justice asking for declaratory
3 judgment. But then the plaintiffs come back and say, well,
4 we did ask for declaratory judgment. And then later on in
5 their papers, what do they say? Well, since we cannot get a
6 declaratory judgment, since it's unavailable within the
7 meaning of amended 1983, then you should keep him in as a
8 party.

9 Your Honor, that's completely contradictory. You must
10 have a violation of a current court order declaring rights
11 for declaratory judgment in order to proceed. There's none
12 here, Your Honor. Or the claim must be the declaratory
13 judgment is not available, and that's not here either.

14 Now, in -- your order that Your Honor entered fits
15 nicely within Rule 65(d)(2). It's not well covered in any
16 of the papers. If I could draw the Court's attention,
17 65(d)(2) is the case for who is bound by a particular
18 injunction. And it says -- the rule says that an injunction
19 is binding on the officers of the defendant, so an
20 injunction against the State will also bind the Chief
21 Justice. 62(d)(2) [sic] says an injunction binds the
22 defendant's, quote, "officers, agents, servants, employees,
23 and attorneys." So even I would be bound, Your Honor.

24 So if the Court enters an injunction against the State
25 preventing the effectuation, as Judge Thomas called it,

1 effectuation of the statute or in this case some injunction
2 against the State of Mississippi, that would be binding on
3 my client as the Chief Justice. But now they claim that a
4 declaratory judgment is unavailable, which is just
5 completely contradictory to their prior positions, and it's
6 almost like, Your Honor, two different people were writing
7 this brief. One is saying that declaratory judgment was
8 asked for and it's available, and the other is saying, well,
9 it's unavailable.

10 Whichever way it is, it's entirely inconsistent and
11 contradictory. The cases cited in the brief on behalf of
12 the Chief Justice and our response to the motions on pages 6
13 and 7 clearly state that a plaintiff cannot obtain a
14 declaratory judgment against the Chief Justice in the first
15 instance, Your Honor.

16 If you look at paragraph -- footnote 2 of the papers,
17 it's clear that the Eleventh and the Second Circuits have
18 both said the same thing, that you can't get a declaratory
19 judgment in the first instance against the judicial officer.
20 What the Court does is you enter a declaratory judgment to
21 say, for example, in this case declaring 1020 to be
22 unconstitutional. If the Chief Justice violates that
23 wording of the declaratory judgment, then and only then can
24 they haul the Chief Justice back into court and hold him
25 either in contempt or enter an injunction against him to

1 prevent other violation.

2 On page 8 of the brief, there is the quotation, Your
3 Honor, from the Fifth Circuit, I believe, that Congress
4 allows a carefully laid out appellate process that the
5 plaintiffs in this case can benefit from if they choose to
6 have this case reviewed by the Fifth Circuit.

7 That gets back to our prayer that the rule -- that the
8 Court enter a Rule 54 certification of finality. In other
9 words, this is the last straw. This is the last thing on
10 the docket as it concerns the Chief Justice, and now the
11 case is ready to go on appeal. And as a matter of
12 procedure, appellate procedure, Your Honor, 28 USC 1291
13 provides for an appeal for final judgments. 1292 provides
14 appeal for interlocutory judgments, like this one, that
15 concern the denial or the granting of a temporary
16 restraining order or a permanent injunction, or an
17 injunction -- a prayer for injunctive relief.

18 So this case is available for appeal, but it is not
19 certain in my mind what the deadline for that appeal would
20 be. If the Court were to enter a Rule 54(b) certification,
21 then under Rule 3 of the Rules of Appellate Procedure, they
22 would have 30 days to file an appeal.

23 So in other words, what we're asking for, Your Honor,
24 is finality and appealability of this order. The motion for
25 clarification is nothing more than a distraction. The Chief

1 Justice is simply not a proper party. We cite the *Bauer*
2 case, B-A-U-E-R. The Fifth Circuit, 2003, on page 9 of the
3 brief talks about that. I encourage Your Honor to take a
4 look at that case. It says that these claims -- these type
5 of claims are not actionable against a judicial officer, and
6 in this case the Chief Justice. When a state law is
7 challenged as unconstitutional, the state court judge is not
8 a proper party, Your Honor, and that is unique about this
9 case, because this case does not concern actions that the
10 Chief Justice has taken in the past.

11 Like, for example, my client does not maintain that he
12 is above the law Your Honor. If he drives away from this
13 courthouse and hits somebody with his car, he's liable to be
14 sued for the tort of an auto accident. There's nothing in
15 the law that prevents that, and the Justice recognizes that.
16 But since this is a case challenging the constitutionality
17 of a state law, a state judge is not a proper party
18 regardless of the type of relief that is rendered. That
19 includes declaratory, injunctive, and other equitable
20 relief. And the plaintiffs even agree with the premise of
21 that the argument, which is that the Chief Justice has done
22 nothing wrong. It's pure speculation that the Chief Justice
23 would appoint a judge while this litigation is pending, Your
24 Honor. Now, he can't tell the Court no, I'm not, or yes, I
25 am, without rendering some type of opinion, which is

1 prohibited. The Chief Justice cannot state some type of
2 advisory opinion about what his actions in the future will
3 or will not be, and we've told the plaintiffs that over and
4 over again.

5 Now, the state court case is on appeal. That, of
6 course, is going to take its own route. And as this Court
7 held, the judicial appointment is a legislative grant of
8 authority. It is a legislative grant of jurisdiction, and
9 it follows that the Chief would have the authority to act.
10 But should 1020 be declared unconstitutional, as this Court
11 pointed out, that authority would vanishes. That's good
12 wording, Your Honor. That's very good observation, because
13 it rings true. It rings true because it rings in
14 conformance with the law of the Fifth Circuit that you can't
15 sue a state court judge when the state court has before it a
16 future of the constitutionality of a particular state
17 statute.

18 There's no authority for the proposition that the state
19 court judge must be a party here today. And there's much
20 authority to the contrary, which, again, I reference and
21 draw the Court's attention back to note number 2 in the
22 papers. At bottom, Your Honor, what adversary position
23 should Chief Justice Randolph have with the plaintiffs?
24 None. There is none. Therefore, there's no case or
25 controversy, and this Court is without jurisdiction. This

1 Court is not granted Article III jurisdiction to handle the
2 case because there's no standing under Article III for
3 either the plaintiffs or the defendants as it concerns the
4 specific allegations against the Chief Justice to be
5 distinguished from the allegations that are promoted against
6 the State.

7 And, Your Honor, with that, this motion that's pending
8 for clarification is nothing more than a rehearing in
9 disguise. They have used up their Rule 59 and Rule 60
10 opportunity with this motion. It should be denied, and then
11 we pray that the Court consider and pray that the Court
12 enter a Rule 54(b) certification, bringing all this to an
13 end. That would start the clock -- if the Court enters the
14 certification, that would start the clock for appeal for the
15 plaintiffs, and we are very confident that the Fifth Circuit
16 Court of Appeals will agree with Your Honor's opinion of
17 June the 1st and it should be taken up.

18 So the motion to consolidate in this case has nothing
19 to do with the judge, and he has no position in it, as Ms.
20 Wu was arguing earlier. We don't take a position on that
21 motion, and those are -- I think those are the only motions
22 that are pending, Your Honor. We have the motion for a Rule
23 54 certification; we have the motion to consolidate; and
24 then there's the motion for clarification, I guess.
25 Whatever Your Honor wants to call that, that would be the

1 plaintiffs' motion for a new trial or rehearing or
2 reconsideration.

3 So I believe that's all we've got to say about these
4 things, Your Honor. Unless Your Honor has some questions.

5 THE COURT: I do. Just two. One, you mentioned how
6 Justice Randolph should not be here. I didn't order him to
7 come this morning.

8 MR. NELSON: Yes, Your Honor. We understand that.

9 THE COURT: Okay.

10 MR. NELSON: He's here in order to put on emphasis on
11 the consequential nature of this case.

12 THE COURT: Right. And so he came out of interest
13 concerning his case.

14 MR. NELSON: That's right.

15 THE COURT: Right. Which is fine. But I was just
16 making sure that no one thought that this Court was
17 directing him --

18 MR. NELSON: Oh, no, sir. No, sir.

19 THE COURT: -- as a requirement to come, because the
20 Court recognizes that he has duties down at the court and
21 your presence here would have been enough to make the
22 argument.

23 MR. NELSON: Oh, yes, sir. We considered that very
24 much so, and Your Honor did nothing to compel his appearance
25 here today. He's here in order to listen to what happens,

1 to make notes of things that are said, and that -- in
2 deference to Your Honor's position.

3 THE COURT: Okay. And then the next question. During
4 your last session here making argument on this matter of
5 judicial immunity, you had made a statement that your
6 client, the Chief Justice, would abide by whatever the Court
7 said about appointment of judges because at present he had
8 no intentions of appointing any judges. That's what I seem
9 to recall. Is that right?

10 MR. NELSON: That sounds about right, Your Honor. I
11 think I didn't go quite that far. I didn't intend to. What
12 I meant to say, if I said that, is that the Chief Justice
13 will abide by the decisions of this Court, period.

14 THE COURT: Oh, I mean, I recognize he would do that.

15 MR. NELSON: Yes, sir.

16 THE COURT: But on this question of whether he would,
17 upon a finding of judicial immunity, go ahead and try and
18 make the appointments, you said that this Court had
19 available to it another approach, and that is the Court
20 could determine whether the statute itself was
21 constitutional, and if the Court determined that it was
22 unconstitutional, of course the Chief Justice would abide by
23 that ruling --

24 MR. NELSON: Correct.

25 THE COURT: -- and would not make any appointments.

1 MR. NELSON: Yes, sir.

2 THE COURT: But I thought implicit in that statement
3 was the assertion that the Chief Justice, before making any
4 appointments, would await the declaration of this Court as
5 to whether the statute itself is constitutional.

6 MR. NELSON: May I confer with my client?

7 THE COURT: Yes.

8 MR. NELSON: Your Honor, may we have leave to allow the
9 Chief Justice to address the Court?

10 THE COURT: Sure, if he wishes to do so.

11 MR. NELSON: He is a member of the bar, of course.
12 Thank you, Your Honor.

13 THE COURT: When is the last time you had a chance to
14 address a court?

15 JUSTICE RANDOLPH: It has been over 19 years, Your
16 Honor.

17 THE COURT: It has been a while, hasn't it?

18 JUSTICE RANDOLPH: It has been a while, and probably
19 more than that since I've addressed you, but it's always a
20 pleasure to be before you. I have a great deal of respect
21 for you and for every court in this land.

22 This case was never about Mike Randolph to me.
23 Although other people want to invite me or select me to --
24 for whatever purpose they deem appropriate, and the research
25 and the hours that I have spent in looking at this just

1 because that's me. I mean, I've appeared before you. You
2 know I'm a detailed person. I have not found a single case
3 in the United States of America where a chief justice has
4 been sued in a case -- state court and federal, almost
5 simultaneously, where a chief justice was named as a party
6 to determine the constitutionality of a statute. Never.

7 I don't think I should be in this court. I think
8 you've already discharged me from this court.
9 Misrepresentations have been made to this court by
10 Mr. Rhodes seated here to my left, who had made statements
11 that counsel would not agree with him. I instructed counsel
12 that anything that the NAACP wanted any clarification --
13 this is before we got here. That any deal that they wanted,
14 any concession from the Chief Justice on a pending case
15 pending in two courts, put it in writing; I'll respond to
16 it.

17 That's what was told Mr. Rhodes. So it wasn't "counsel
18 said." Put it in writing and I'll respond to it. It was
19 never put in writing, and that was on more than one
20 occasion, because one occasion I was riding in a car with --
21 I don't think he intentionally did that, but it's still a
22 misstatement. That people put things in writing.

23 I've taken a position I will not commit any
24 unconstitutional acts. I've always taken that position. I
25 hope that I never have committed an unconstitutional act.

1 So that's what I say to the Court. But as far as trying to
2 make agreements with people who you are suing me who won't
3 put it in writing, I have chose not to do that. So if they
4 want to put something in writing, I'll look at it.

5 I also bring to the Court's attention that on July 6,
6 this matter, the constitutionality, which -- state
7 constitutionality, that statute is before the Supreme Court.
8 It was granted expedited treatment. I did not object to
9 expedited treatment for the same ruling I got in the state
10 court that I could be out of that case.

11 So I am always most careful trying not to make
12 agreements. Where we are right now is I am not a party in
13 this case, according to your order, as you said. I appeared
14 here on my own volition today to hear what gets said, and
15 also obviously if I -- depending on the ruling that the
16 Court made on that motion, then the ruling on whether the
17 cases should be consolidated to entirely different cases was
18 upmost importance, so I didn't know what order you would
19 address them in, but certainly you did not order me to be
20 here today. You haven't ordered me to be in any of these
21 proceedings. But never has the Chief Justice, ever, been
22 sued trying to determine whether a -- something passed by
23 the legislature and signed by the governor is constitutional
24 or not. It puts me in a rather precarious position, and I
25 choose not to make agreements with those people that sue me

1 unless they want to put something in writing.

2 THE COURT: All right. Thank you.

3 JUSTICE RANDOLPH: Thank you, sir.

4 MR. NELSON: Unless Your Honor has some more questions,
5 that concludes our comments on the pending motions.

6 THE COURT: All right. Now, I want to hear from --

7 JUSTICE RANDOLPH: Let me -- I do want to say a couple
8 of other things.

9 THE COURT: Go right ahead.

10 JUSTICE RANDOLPH: Because there are some
11 misconceptions. I have been Chief Justice since June 1st of
12 '19. I have made 1500 and something appointments to over 75
13 judges throughout counties in this state, some more than
14 Hinds County. So these obligations about orders and -- I
15 can't remember whether it was this case or the state case,
16 because I do remember seeing 200 cases mentioned in your
17 order, because the state case said 200. But actually, there
18 was four appointments in that case. In 200 cases, none of
19 them were for a term. Fifty cases came from each judge that
20 they selected the cases that would receive these
21 appointments, and those judges were given the charge: Bring
22 these cases to fruition. And if you're going to take a
23 lunch break and you want to know that works out, I'll fill
24 in the blanks during the lunch hour.

25 I also reviewed information this morning that has do

1 with appointments, how much money went to it. Also results,
2 how many cases went into it. And it will absolutely verify
3 the observations that you made in your order that crime's
4 going up -- crime is going up, but at the same time,
5 disposition of cases are going down because the actual
6 document that's being prepared for the federal government on
7 funding and those kind of issues says because of the
8 corporation of the four judges of Hinds County -- the four
9 sitting judges along with the ones I appointed, here is the
10 marvelous results, and then it points out how many cases
11 were -- I think -- I believe in '22 through '23, I think
12 667 cases were disposed of as a result of that.

13 So there's a lot of filling in of the facts, which we
14 never get the opportunity to do because of immunity. We
15 shouldn't have to defend it on the merits. But those who
16 choose not to study the facts of the cases and make those
17 kinds of allegations, the courts are only left with what's
18 presented to them, and so unfortunately, that's where we
19 find ourselves. But if the Court wants more, I'll get more.
20 The facts are amazing.

21 And with -- in conjunction with the elected judges of
22 the counties, including getting emails and thank you letters
23 from Denise Owens and from Tommie Green and other judges in
24 this community, that's how the ones that I dealt with, the
25 individual judges, responded to the assistance that the

1 legislature gave me money originally out of CARES Act money
2 and then subsequently out of the Relief Act money for us to
3 monitor those cases and put judges in cases. And the only
4 complaints that I heard was from Betty Sanders. Judge
5 Sanders complained because she had to sit in a courtroom
6 that rain was coming in on her head and getting the
7 equipment wet, and because people were getting pulled out
8 from being bailiffs. Other judges, they weren't given space
9 and weren't accommodated. So that was the only complaints,
10 but it was not about voting rights or racial discrimination,
11 none of that. It was about they won't give us the ability
12 to succeed in this noble cause to reduce the number of
13 incarcerated people, so the guilty ones go to prison and the
14 innocent ones goes home. That's what I'm about. Thank you.

15 THE COURT: Thank you much.

16 All right. Now, then, I want to turn to Mr. Rhodes.
17 Mr. Rhodes, you filed this motion for clarification.

18 MR. RHODES: Your Honor, may it please the Court, I am
19 going to have Mr. Brenden Cline make the argument. I did
20 want to address one thing that the Chief Justice has said,
21 almost accused me of filing a declaration that was untrue.
22 The declaration I filed was true because that was on a
23 telephone call with one of his lawyers, Mr. Ned Nelson.
24 They had said other things prior to the actual call that
25 night when we had to file a response, and that declaration

1 is based upon that one telephone call, so it was true as to
2 what was said at that time.

3 But we would have Mr. Brenden Cline address the
4 motions.

5 THE COURT: So what declaration are we talking about?

6 MR. RHODES: I forget which one it was, Judge.

7 THE COURT: Pardon me?

8 MR. RHODES: The only one that I filed, I think, in the
9 case.

10 THE COURT: Meaning your declaration?

11 MR. RHODES: My declaration.

12 THE COURT: Okay.

13 MR. RHODES: And it's based on what counsel Ned Nelson
14 said at that time in that call, not based on what the Chief
15 had said earlier, what Mark Nelson had said earlier, and
16 other.

17 THE COURT: And what are you saying that he said?

18 MR. RHODES: They did not take a -- would not take a
19 position. He did not state on that telephone call put it in
20 writing. On that call he did not state that. He just said
21 they weren't taking a position, the Chief Justice should not
22 be party, could not be sued, and they weren't going to take
23 any position on the question of when we asked would he --
24 same question the Court asked: Would he abide by any ruling
25 of the Court without us having to move forward with the

1 injunctive relief? And basically they said the Chief
2 Justice would not take any position. So that's all that
3 declaration stated.

4 THE COURT: All right. I remember the declaration.
5 But, now, who is going to make the argument here on this
6 motion to clarify?

7 MR. RHODES: Brenden Cline, Your Honor.

8 THE COURT: Okay. Counsel, come forward. Now, let's
9 start off with this. Counsel for the Chief Justice has
10 contended that this motion should have had some sort of
11 cause number to it or some sort of Federal Rules of Civil
12 Procedure number to it. Is there such a number?

13 MR. CLINE: No, Your Honor. I can walk through those
14 points that were made one by one to start.

15 THE COURT: Start me off on the authority for a motion
16 to clarify.

17 MR. CLINE: Absolutely, Your Honor.

18 THE COURT: Under what Federal Rule of Civil Procedure
19 is this motion being submitted?

20 MR. CLINE: So there isn't an express motion for
21 clarification for a nonfinal judgment. Plaintiffs presented
22 the motion in this format because of the Court's request for
23 clarification on what should happen to the TRO that is
24 currently in place enjoining the Chief Justice from making
25 the appointments at issue in Section 1 of H.B. 1020. So

1 there isn't a formal provision for that, but we wanted to
2 get that before Your Honor as part of the consideration of
3 what to do going forward in this case.

4 THE COURT: Okay. Now, has anything changed with your
5 position since this Court issued its opinion concerning
6 judicial immunity? Has anything changed?

7 MR. CLINE: Nothing has changed with respect to our
8 position, but Your Honor's order -- because it was following
9 the motion as it was teed up by Mr. Nelson and only
10 addressed one of the four arguments that he made, the relief
11 that that order provides does not match the argument that
12 was accepted, so there's internal inconsistency there that
13 then creates confusion, which I would hope to clarify for
14 Your Honor today, which that leads us going forward.

15 THE COURT: Okay. All right. In the papers that you
16 all filed, you said that this matter of the appointment was
17 only one matter that was raised in the complaint.

18 MR. CLINE: That's right.

19 THE COURT: You further said that this Court's ruling
20 on the matter of judicial immunity only dealt with that one
21 matter.

22 MR. CLINE: That's right.

23 THE COURT: And that were other matters in the
24 complaint directed at the Chief Justice; is that correct?

25 MR. CLINE: That's correct.

1 THE COURT: So you are saying that even though this
2 Court has ruled on judicial immunity, that that does not
3 close the inquiry concerning the Chief Justice's presence in
4 this lawsuit.

5 MR. CLINE: That's exactly right.

6 THE COURT: So tell me, then, and point to the parts of
7 your complaint where you're contending that the Chief
8 Justice was named in other capacities and why he should
9 remain a part of this litigation.

10 MR. CLINE: Yes, Your Honor. So plaintiffs' complaint
11 styled complaint for declaratory and injunctive relief
12 enumerated as Count 2 on page 47, our challenge that has
13 been the subject of the TRO and now preliminary injunction
14 request, that's Section 1 of H.B. 1020. On page 50 of our
15 complaint, we have our prayer for relief there regarding
16 declaratory relief. I can read that for Your Honor. That's
17 Clause B where plaintiffs respectfully request that the
18 Court, quote, "declare that H.B. 1020's packing of the Hinds
19 County Circuit Court intentionally discriminates against
20 Jackson's residents on the basis of race."

21 There's no limitation in plaintiffs' pleading of
22 Count 2 or this prayer for relief that would suggest it
23 applies to other defendants besides the Chief Justice, and
24 if you look at our allegations which were incorporated by
25 reference, clearly specifies that the appointments at issue

1 is only to be done by the Chief Justice. That's where we've
2 gotten into all this briefing so far. So the relief is
3 supposed to match the claim that is presented in that count.
4 And that's the first claim that we have that concerns the
5 Chief Justice. That's, as I mentioned, Count 2, which is
6 for injunctive and declaratory relief.

7 We also have Count 4 -- or, excuse me, Count 3
8 regarding Section 4. This is for a different judicial
9 appointment that the Chief Justice has been tasked uniquely
10 in H.B. 1020 with appointing. That is the CCID inferior
11 court judge.

12 The Chief Justice stood up here a moment ago and said
13 he's made 1500 judicial appointments in his time as Chief
14 Justice. Not one of those appointments has been anything
15 like the CCID inferior court judge. That judge is unique
16 and parallel to a municipal court judge. Municipal court
17 judges have never been appointed by the Chief Justice. This
18 would be the first time.

19 So in its motion did not challenge that claim, did not
20 challenge that claim for injunctive relief, did not
21 challenge that claim for declaratory relief. And as I
22 mentioned, our complaint clearly includes those claims,
23 clearly includes those claims for both injunctive and
24 declaratory relief.

25 If Your Honor would like, I could provide a little bit

1 of background of how we got to this stage of the motion for
2 clarification. I think that could be a little bit
3 clarifying in setting the table here.

4 THE COURT: Well, before you do that, can you go back
5 to your complaint and name any other provisions of your
6 complaint which would embrace the Chief Justice. Are those
7 the entirety; that is, Counts 2 and 3, and of Count 3
8 Section 4? Is that it?

9 MR. CLINE: Well, our factual allegations, of course,
10 allege that the Chief Justice is responsible for making the
11 appointments at issue in Count 2 and at issue in Count 3.
12 The Chief Justice doesn't contest that background factual
13 allegation. They instead quarrel with our technical
14 pleading by not specifying that this count goes to the Chief
15 Justice rather than other defendants. I think they read the
16 absence of a mention of the Chief Justice's name in that
17 count to mean that nobody is the subject of that count
18 rather than everybody is the subject of that count.

19 THE COURT: And what about Count 3?

20 MR. CLINE: The same goes for Count 3. Each of
21 plaintiffs' counts were alleged against all defendants,
22 although clearly the appointment issue is just directed --
23 as the way it's framed, just that appointment, singular
24 moment, is just framed against the Chief Justice.

25 THE COURT: Why wouldn't my order granting him judicial

1 immunity speak to Counts 2 and 3?

2 MR. CLINE: So your order granting him judicial
3 immunity was speaking to the injunctive relief portion of
4 Count 2 because that was what was teed up in that motion.
5 So the motion to dismiss that they filed raised four
6 arguments, three of which would have counseled, according to
7 them, for complete dismissal of the Chief Justice from this
8 case. Those arguments were that the chancery court had
9 assumed jurisdiction over this dispute, that the Chief
10 Justice is a neutral, that public policy considerations
11 counsel dismissing the Chief Justice from this case in its
12 entirety. All of those arguments Your Honor did not reach.
13 We have what we believe are strong arguments for them not
14 being a basis for dismissal in this action.

15 The judicial immunity argument was limited to Section 1
16 for prospective relief. I can point you to page 7 of their
17 motion where it makes that clear. On page 7 of the motion,
18 counsel for the Chief Justice wrote, and I quote, "The
19 plaintiffs now seek injunctive relief against the Chief
20 Justice based on allegations under 42 USC, Section 1983. A
21 chancellor's decree renders the current motion for TRO
22 moot."

23 On the next page, page 8, they go on to describe
24 judicial immunity and say: Such immunity extends to
25 prospective injunctions. There's no mention of plaintiffs'

1 claim for declaratory relief on the face of the motion, in
2 the memorandum in support, or in their reply brief. There's
3 also no mention of the CCID inferior court judge or
4 Section 4 in that motion, memorandum in support, or reply
5 brief.

6 Those claims were clearly in the complaint, Your Honor,
7 but they were not addressed by the motion. So when
8 plaintiffs responded, we responded and addressed the
9 arguments as they were made. It was not plaintiffs' burden
10 to take on the affirmative defense burden of defendants and
11 try to show hypothetical arguments that had not been made
12 why those would fail, so we addressed the arguments as they
13 were presented. We pointed out that, of course, an
14 affirmative defense like judicial immunity must be shown on
15 the face of the complaint and must be shown by the defendant
16 in order for the defendant to succeed on that motion. And
17 as I've just pointed out on page 7, they only bothered to do
18 that with respect to the Section 1 claim for prospective
19 injunctive relief.

20 Now, in response to this motion for clarification,
21 counsel for the Chief Justice is arguing that plaintiffs
22 somehow waived this issue even though it wasn't our burden.
23 I'll point out that their reply brief never mentioned that
24 at all. You'd think that if plaintiffs were actually
25 waiving arguments and waiving our ability to make claims,

1 that in a reply in support of a motion to dismiss they would
2 have pointed that out. There's, again, no mention of that.
3 They focus their ammunition only on Section 1 and only as to
4 prospective injunctive relief.

5 Now, I think it could be clarifying also to go over the
6 text of Section 1983, Your Honor. Could we maybe put this
7 up on the screen? Would that work?

8 THE COURT: Go ahead.

9 MR. CLINE: Can you see that?

10 THE COURT: Yes.

11 MR. CLINE: Okay. So the provision we're all talking
12 about here is this exception and, specifically within that,
13 the exception to the exception. So 1983 provides a cause of
14 action "except that in any action brought against a judicial
15 officer for an act or omission taken in such officer's
16 judicial capacity" -- and I'll stop there, because that's
17 what Your Honor found. That was the judicial immunity
18 conclusion that you reached. -- "injunctive relief shall
19 not be granted." So this is the argument that they were
20 making. "Injunctive relief shall not be granted unless a
21 declaratory decree was violated or declaratory relief was
22 unavailable."

23 Now, the purpose of that text that Congress was
24 providing there was to point out that declaratory relief is
25 always available against a judge acting in their judicial

1 capacity who would otherwise enjoy judicial immunity. The
2 purpose of this amendment here that Congress enacted in 1996
3 was to take away the possibility of injunctive relief when
4 declaratory relief would suffice. So Congress intended that
5 one of two forms of prospective relief would always be
6 available to litigants who are suing a judge in their
7 judicial capacity.

8 That would either be declaratory relief, which has
9 always been allowed against judges, or if that wasn't
10 available, then they could get an injunction. Or if that
11 was available but it did no good because the judge just went
12 ahead and violated that decree anyway, then they can get an
13 injunction.

14 The face of the statute anticipates and requires that
15 declaratory relief was available. So there can be no
16 contention that 1983 or *Bivens* cases which are not under
17 1983, which are implied constitutional causes of action,
18 that those somehow limit plaintiffs' ability to get
19 declaratory relief. This is the text of the statute.

20 As we pointed out in our brief, the legislative history
21 aligns with this. The senate judiciary report said
22 litigants will still be able to get declaratory relief. And
23 we cited numerous cases -- numerous Fifth Circuit cases
24 looking at 1983, which is, again, distinct from *Bivens*
25 cases. Occasionally *Bivens* cases will reference 1983, but

1 the holding in a *Bivens* case has no bearing on this.

2 If Your Honor would like an example of a case beyond
3 the cases cited in the brief, I can provide *Caliste v.*
4 *Cantrell*, 937 F.3d 525. This is Fifth Circuit, 2019. And
5 in this Fifth Circuit case, the panel unanimously affirmed a
6 declaratory judgment entered against a judge about whether
7 the judge's conflict of interest in setting bail violated
8 the plaintiffs' due process rights. And in a footnote
9 there, Footnote 7, the Court concluded that they didn't need
10 to address whether that judge, acting in that capacity,
11 which seems likely a judicial capacity, the Court decided it
12 didn't need to address that judicial immunity question
13 because whether or not it was judicially immune, declaratory
14 relief would always be available, and so they went ahead and
15 affirmed the federal court's grant of a declaratory judgment
16 against that state court judge.

17 I can also provide -- because some of these cases kind
18 of take for granted what we're talking about here. So to
19 maybe further clarify any confusion, I can cite to a Sixth
20 Circuit case that explains this in some detail. That's
21 *Ward v. Norwalk*, 640 Fed.Appx. 462, Sixth Circuit, 2016.
22 That Sixth Circuit opinion, again unanimous, walks through
23 what we're talking about today and says, quote, "the plain
24 language of Section 1983 contemplates a declaratory judgment
25 against judicial officers," and I'm omitting some language

1 about the specifics there. -- against those judicial
2 officers "in their official capacities." This is exactly
3 what we're talking about.

4 So the fact that Chief Justice Randolph is -- as Your
5 Honor found, enjoys judicial immunity, enjoys immunity from
6 injunctive relief, unless there's a problem with plaintiffs'
7 ability to get declaratory relief, that's part of the
8 solution to his motion to dismiss. That doesn't resolve
9 everything. That certainly resolve these other claims that
10 we have before you.

11 I would like to maybe spend a moment to respond to some
12 of the specific points that were raised by opposing counsel
13 and then try to tie together these many threads. Maybe I
14 can speak to the possibilities before the Court with respect
15 to the TRO. That question is also out there.

16 So counsel for the Chief Justice mentioned Federal
17 Rule 7, I think the reasons for relief sought must match
18 there. It's a curious cite because, as I've explained,
19 their motion to dismiss sought relief that did not match the
20 reasons that were provided in that motion.

21 As I have mentioned, 59, 60, those federal rules, those
22 are appropriate for seeking reconsideration of a final
23 judgment in a case. We don't have a final judgment. I am
24 just arguing the Rule 54(b) motion. Plaintiffs have not
25 responded to that. We still have another nine days in which

1 to decide our position on it. We are considering the
2 options, but we currently don't have a position. We think
3 that ruling on that 54(b) motion at this time would be
4 premature. But because it would be premature, we've filed
5 this motion styled as a motion for clarification in order to
6 clarify the issues before the Court while there is no final
7 judgment.

8 We, of course -- plaintiffs want to be respectful of
9 the Chief Justice's time. We have no quarrel with him.
10 He's, for our purposes, just a nominal party due to
11 plaintiffs' inability to sue the State of Mississippi for
12 this law that has been passed. Under *Ex parte Young*, as the
13 State executive defendants have ably pointed out, under
14 *Ex parte Young*, plaintiffs must sue the proper state
15 official who has a sufficient connection to the law at issue
16 in order to be able to proceed and to get relief. And
17 regrettably, that is the Chief Justice in this case.

18 We don't anticipate needing him for anything
19 substantive in the case. We have no plans to take discovery
20 from him. He is a nominal party as far as we are concerned,
21 and we are totally okay with having the state executive
22 defendants, the AG's Office, interpose defenses on his
23 behalf that go to the merits of this case, but for purposes
24 of plaintiffs being able to get relief, we do need him in
25 this case because we could not get on injunction or a

1 declaratory judgment against, for example, the chief of
2 Capitol Police saying that the Chief Justice's ability to
3 appoint judges under H.B. 1020, Section 1, that that is
4 unconstitutional. There needs to be a connection between
5 that defendant and the provision and the relief we are
6 seeking.

7 We would also point out that even though he would be a
8 nominal party who, with any luck, if these filings can come
9 to an end and we can get some level ground on what is
10 happening going forward, we don't anticipate needing the
11 Chief Justice in this case for many years, we have before
12 you a pending motion for preliminary injunction. We plan to
13 seek an expedited declaratory judgment in this case
14 thereafter, assuming Your Honor agrees with us that we
15 continue to have a claim for declaratory judgment, because
16 the question posed by our equal protection claim is a mixed
17 question of law and fact that isn't just a pure question of
18 law but also depends on certain facts about what the
19 legislature was considering, what data was before it, and
20 how it reviewed that data in reaching its decision.

21 Plaintiffs anticipate needing limited expedited
22 discovery that would speak to those issues before trying to
23 get a final judgment on their claims, but that is a question
24 for another day, but that -- just to give Your Honor a
25 preview of what we anticipate happening with this portion of

1 the case, we don't anticipate this portion of the case being
2 a multiyear endeavor. We certainly don't mean to take up
3 more of the Chief Justice's time than is warranted or than
4 we already have.

5 Because I've mentioned in response to a point counsel
6 for the Chief Justice made, we would love to be able to get
7 complete relief against the remaining defendants. That
8 would simplify matters. If what the Chief Justice's counsel
9 said were true, we would happily take them up on it, but
10 unfortunately, we do feel bound, as the state executive
11 defendants pointed out, by *Ex parte Young* and the Fifth
12 Circuit's decisions thereunder. We do not think that we
13 could get complete relief against the remaining defendants
14 in this case if the Chief Justice were to be dismissed.

15 I would also point out that while the Chief Justice's
16 counsel has pointed to a possibility that we could try to
17 get such an injunction against the remaining defendants,
18 they have cited no authority to that effect, and as I
19 mentioned, *Ex parte Young* forecloses that option.

20 On this point of what the Chief Justice will do while
21 this litigation is pending, while we certainly agree that
22 the Chief Justice has no intention of violating the law or
23 the constitution, and we make no such allegation, he is
24 bound by state law until there is a ruling on the
25 constitutionality of that state law. So if this Court were

1 to lift the TRO, he would have an immediate statutory
2 obligation to make the appointments at issue. I think way
3 back when, in the first teleconference in this matter, his
4 counsel suggested that there may be a separation of powers
5 issue under state law. The Chief Justice has not tried to
6 enjoin the law. He has not brought a lawsuit against the
7 legislature, the State of Mississippi trying to get out from
8 that statutory duty. So that statutory duty remains on the
9 books unless and until this Court intervenes.

10 Counsel for the Chief Justice has also pointed out that
11 an injunction against the State will bind the Chief Justice.
12 Again, as I mentioned, *Ex parte Young*, we are not able to
13 sue the State. The State is not a party.

14 MR. NELSON: Your Honor, I am having real trouble
15 understanding what the counsel is saying. Can he speak in
16 the microphone, please?

17 MR. CLINE: I apologize. Yep.

18 THE COURT: He said they had some difficulty trying to
19 wage a lawsuit against the State because the State is not a
20 party.

21 MR. CLINE: There was a mention of a possibility of an
22 appeal, Your Honor. We don't think an appeal is needed at
23 this time because, while our -- while, of course, we had a
24 different position with respect to the judge's immunity, the
25 unavailability of a permanent injunction at the conclusion

1 of this case is no bar to relief before then or to an
2 ultimate declaratory judgment that the Chief Justice has
3 pledged to abide by regardless of the availability of
4 injunctive relief.

5 There is also an mention of the *Bauer* case, a Fifth
6 Circuit case. We can get into the cases one by one, but
7 they specifically called that one out. Respectfully, it
8 doesn't say what they say it says. That case involved
9 as-applied challenges -- or, excuse me, as-applied
10 allegations about a judge mistreating a litigant in the
11 past, and then after that matter ended, the litigant brought
12 a facial challenge to the law that had allowed for this
13 probate judge to have jurisdiction over that prior case, and
14 in those circumstances they said that judge was not a prior
15 party, there was no connection, there was no standing there.
16 It's completely distinguishable from the situation we have
17 here.

18 I could make some responses on the merits to what Chief
19 Justice Randolph has raised, but I think that's probably
20 better saved for discussion of the preliminary injunction if
21 we get there today, Your Honor. But I think with all that
22 said, unless Your Honor has further questions about the
23 motion for clarification, I can speak to the impact that
24 would have on the original question for today's hearing,
25 which is: What consequences does that have for the existing

1 TRO and what steps should the Court take going forward?

2 THE COURT: All right. Thank you.

3 Mr. Nelson, do you have some more comments?

4 MR. NELSON: Yes, I do.

5 THE COURT: Go ahead.

6 MR. NELSON: Your Honor, I would like to read Your
7 Honor's order at page 23. The doctrine of judicial immunity
8 shelters judges from lawsuits, not claims, whether
9 declaratory or injunctive, when the judge in his
10 jurisdiction performs a judicial act or is about to perform
11 a judicial act. Often cited case law found in these pages
12 shows that the docket is alive and vigorous. This Court
13 applies their guiding principles and arrives at the only
14 conclusion it could: Chief Justice Randolph must be
15 dismissed from this litigation.

16 Your Honor, I don't see anything there that talks about
17 nominal party. Today is the first time that it has been
18 alleged that the Chief Justice can stay in this litigation
19 as a nominal party. That serves no purpose, Your Honor.
20 The cases that were cited to Your Honor, I have familiarity
21 with them. They do not concern allegations that the state
22 law is unconstitutional, which makes this case unique.

23 There is no rule for a motion for clarification, and
24 the fact that the State is not a party, Your Honor, is just
25 something that doesn't concern the Chief Justice. If they

1 need the State to be a party, then they should name them.
2 They have chosen to name individuals in their official
3 capacities. If they need to sue the State, then they need
4 to file an amended complaint to sue the State. That is not
5 a concern for us.

6 And, Your Honor, it puzzles me that in the first
7 instance in the motion for clarification, the plaintiffs say
8 we can get declaratory relief in this case and we've alleged
9 it and therefore it's available, and then later on in the
10 papers they say, well, we can't get declaratory relief, so
11 it's unavailable to us. And unavailability for declaratory
12 relief in 1983 applies to any court, state or federal. So
13 that is -- I think that's all we've got to say, Your Honor.
14 We would urge Your Honor to rule and let us have the clock
15 ticking on appeal, because that's where this case needs to
16 be appeal.

17 Thank you, Your Honor.

18 THE COURT: Okay. Anything else?

19 MR. CLINE: Thank you, Your Honor.

20 If I may turn to this question of whether we're being
21 inconsistent in saying declaratory relief is or is not
22 available, I think I can clarify that too, hopefully. It is
23 pretty confusing, so let me know if you have any questions.

24 So based on what I've said before, if Your Honor agrees
25 that plaintiffs continue to have an unchallenged claim for

1 declaratory relief in this case, we would submit that going
2 forward the most appropriate thing to do is to --

3 MR. NELSON: Your Honor, I can't hear counsel.

4 MR. CLINE: I apologize. I am having the problem with
5 height as well here.

6 So going forward, plaintiffs would submit if Your Honor
7 agrees that declaratory relief is available, that plaintiffs
8 continue to have an unchallenged claim for declaratory
9 judgment, plaintiffs would submit the cleanest, simplest way
10 to proceed would be to continue to plaintiffs' motion for
11 preliminary injunction, consider the same arguments that we
12 made there, make the same findings of fact and conclusions
13 of law, but at the end, instead of saying, Accordingly, the
14 Court preliminarily enjoins the Chief Justice from making
15 his appointments because the law is substantially likely to
16 be unconstitutional, Your Honor provide the milder relief of
17 just saying, Accordingly, the Court declares H.B. 1020,
18 Section 1, is substantially likely to be unconstitutional.

19 In an ordinary case, that may not do anything. This is
20 a unique case. As counsel for the Chief Justice pointed out
21 repeatedly -- and we cite to this in our papers. As they
22 pointed out at the prior hearing, I'll just quote from one
23 of these passages, they say, "That's my client's position,
24 that if this Court enters a decree and declares this statute
25 unconstitutional, my client is obliged by law and obliged by

1 the Code of Judicial Conduct to give effect to your Court's
2 decree."

3 This is a very rare case where the defendant has a
4 separate legal obligation or the defendant has taken their
5 own judicial oath of office that requires them to give
6 unusual respect to this Court's pronouncement by a decree,
7 which may not be binding in other situations. Just that
8 commitment on its own, because, as I mentioned, absent
9 action from this Court, Chief Justice Randolph, whether he
10 likes it or not, has a statutory obligation to make those
11 appointments and make those immediately if the TRO is
12 lifted. We would submit that Your Honor can take him at his
13 word on this, proceed to the preliminary injunction, and
14 just provide declaratory relief at this time.

15 And then once we proceed to a trial on the merits, to
16 however the merits are ultimately resolved, that then
17 plaintiffs can get just a declaratory judgment to finalize
18 this tentative declaratory decree that Your Honor would
19 issue. So that is plaintiffs' first position.

20 If Your Honor thinks that that sort of tentative
21 declaratory decree is not available, then we get back into
22 the 1983 exception to the exception. If that declaratory
23 relief is unavailable, then according to 1983, injunctive
24 relief is. So while Your Honor's order would continue to
25 preclude plaintiffs from being able to seek a permanent

1 injunction, if a declaratory decree in the meantime were
2 unavailable, then plaintiffs could pursue a preliminary
3 injunction until such time that the Court can provide a
4 final declaratory judgment. So in that situation, Your
5 Honor could proceed to the preliminary injunction and grant
6 the preliminary injunction.

7 And we say this because if the TRO is lifted, at that
8 moment -- I mean, for all we know, respectfully, the Chief
9 Justice may have already been preparing for these judicial
10 appointments he has to make. I'm sure he's been
11 interviewing candidates. I'm sure it's all on hold. But he
12 may have already signed, for all we know, orders that just
13 take effect upon lifting of Your Honor's decree or -- or he
14 may not have.

15 MR. NELSON: Your Honor, we would object to him going
16 on about the Justice's political future. We would object.
17 That is totally wrong for what we are talking about here.

18 MR. CLINE: I don't mean to disparage anything here.
19 I'm just saying the possibilities --

20 MR. NELSON: Your Honor, the -- (unintelligible
21 crosstalk).

22 THE COURT: All right. Don't talk to him. Just talk
23 to me.

24 Go ahead.

25 MR. CLINE: I don't mean to make any disparaging

1 remarks. I'm just referring to the statutory obligation.
2 Just as the Chief Justice has an obligation to obey the
3 constitution, he also has an obligation to obey the laws of
4 the State of Mississippi, and under H.B. 1020, it said
5 within 15 days of passage, he is to make those appointments.
6 So if Your Honor lifts the TRO, he is statutorily obligated
7 to make those appointments.

8 Now, if the TRO is lifted and he immediately complies
9 with this now by that point overdue statutory obligation,
10 then the declaratory relief that plaintiffs would be
11 seeking, this interim declaratory -- tentative declaratory
12 decree, that would no longer be available, because at that
13 point, that would just be looking just at that singular
14 moment of that appointment. That would be wholly past.
15 That would be a wholly retrospective declaratory decree, and
16 retrospective -- wholly retrospective declaratory decrees
17 are not allowed. That's -- the law is clear on this. One
18 of the cases that we cite *Justice Network, Inc. v. Craighead*
19 *County*, 931 F.3d 753. That's an Eighth Circuit case, 2019.

20 That case points out that "most courts hold that the
21 amendment to Section 1983 does not bar declaratory relief
22 against judges." In the very next paragraph, it says
23 "retrospective declaratory relief cannot 'be granted as the
24 Eleventh Amendment does not permit judgments against state
25 officers declaring that they violated federal law in the

1 past.'" In addition --

2 MR. NELSON: Your Honor, can we have a copy of the
3 cases that counsel was citing?

4 MR. CLINE: That's cited in our papers.

5 MR. NELSON: Please address the Court, not me.

6 THE COURT: All right. Go ahead and finish your
7 argument. You are okay.

8 MR. CLINE: All right. In addition to this case cited
9 in our papers, Your Honor can find ample Fifth Circuit
10 authority to the same effect that wholly retrospective
11 relief is not available for a declaratory decree. To give
12 you one example, which, again, is just repeating the same
13 thing, that can be found in the case cited in our papers. I
14 would point to *Corn versus Mississippi Department of Public*
15 *Safety*, 954 F.3d 268 at page 276. That's Fifth Circuit,
16 2020. The Fifth Circuit said, quote, "The *Ex parte Young*
17 doctrine does not permit 'a declaratory judgment that
18 respondent violated a federal law in the past.'"

19 So for those reasons, Your Honor, if you find that you
20 cannot take the Chief Justice at his word -- at his
21 counsel's word that they will abide by a declaratory decree
22 and abide by that in lieu of making the statutorily
23 obligated appointments, if that option is not available to
24 Your Honor, then a preliminary injunction is available,
25 because Your Honor could not proceed to declare something --

1 only looking at this act that will have taken place in the
2 past, you could not declare that to be unconstitutional.

3 So those are the two options: First, if Your Honor
4 agrees that we have at the end of this case an option to get
5 a declaratory judgment against the Chief Justice. If Your
6 Honor disagrees with everything I've said, very briefly --
7 hopefully you don't disagree with everything that I've said.
8 If Your Honor concludes that this dismissal order
9 encompassed not just this Section 1 claim for declaratory --
10 or, excuse me, Section 1 claim for injunctive relief but it
11 also included this unchallenged claim for declaratory
12 relief, then we again get right back into the 1983 exception
13 to the exception because Your Honor will have concluded that
14 the Chief Justice enjoys judicial immunity and that
15 declaratory relief is unavailable.

16 And in that case notwithstanding -- as Section 1983
17 says, notwithstanding judicial immunity for an act taken by
18 a judicial officer in their judicial capacity, if
19 declaratory relief isn't available, then injunctive relief
20 is. So if Your Honor concludes that we have no claim at the
21 end of this case for declaratory judgment and that the Chief
22 Justice enjoys judicial immunity, then we can still get
23 injunctive relief, so Your Honor can still proceed to
24 consider the preliminary injunction, grant the preliminary
25 injunction, and grant a permanent injunction at the

1 conclusion of this case.

2 THE COURT: All right. Thank you very much.

3 Mr. Martin?

4 MR. NELSON: Very briefly, Your Honor.

5 THE COURT: Okay. Go to the podium.

6 MR. NELSON: Thank you for the opportunity, Your Honor.

7 As Ms. Wu called it, these are procedural potentials,
8 but they are not actualities, Your Honor. There is no
9 compelling reason here to grant any relief to the
10 plaintiffs. The fact that this is addressed -- these cases
11 only allow immunity for past acts belies the point of what
12 an injunction is all about, Your Honor. I can't envision an
13 injunction that concerns past acts. I envision an
14 injunction only for prospective purposes. Congress was
15 clear when it amended 1983, and the Second Circuit and the
16 Eleventh Circuit, and I propose that the Fifth Circuit will
17 rule the same way when it's presented with this case, that a
18 case concerning the constitutionality of a state statute,
19 you cannot sue the judge. This is just very plain, Your
20 Honor. There is no other case like this out there, and we
21 would like to have the Court certify this for appeal and
22 dismiss and excuse us from being here any further.

23 Thank you, Your Honor.

24 THE COURT: All right. Counsel, thank you for your
25 arguments. I will -- yes.

1 MR. SHANNON: Your Honor, I don't mean to interrupt,
2 but just on behalf of the state executive defendants, at the
3 appropriate time, we would like to be heard on the original
4 issue that was the subject of the notice of oral argument
5 being the effect of the dismissal of Chief Justice Randolph
6 on the current TRO that's in place and the request for
7 injunctive relief. I didn't want the train to leave the
8 station without us, Your Honor.

9 THE COURT: Well, do you want to go ahead and be heard
10 now?

11 MR. SHANNON: Well, I don't know whether Your Honor
12 would prefer to break for lunch. I'll do whatever the Court
13 prefers, Your Honor.

14 THE COURT: Well, what I had said earlier was that I
15 was going to go ahead and break for lunch, and since the
16 Chief Justice had been here all this time, to get him back
17 to his court in case he needs to be back over there. Now,
18 how long will your argument be?

19 MR. SHANNON: I would say 15 to 20 minutes at the most.

20 THE COURT: Well, that's a pretty long time, especially
21 at the time that we are at now.

22 MR. SHANNON: I understand, Your Honor.

23 THE COURT: Okay. Well, I want to hear what you have
24 to say on it, but on the other hand, I was trying to get the
25 Chief Justice out of here.

1 And also, Justice Randolph, do you have something on
2 your calendar this afternoon that you need to get back to?

3 JUSTICE RANDOLPH: Your Honor, I'll defer to Your Honor
4 and either way you want to go unless the State wants to
5 object to me being -- going home. And then if they got
6 something to say, they got something to say. If they want
7 to object to it, they need to tell the Court that.

8 THE COURT: Okay. Well, then, hold it. We'll have to
9 take our lunch recess. And so, Terri, what time is it now?

10 (An off-the-record discussion was held.)

11 THE COURT: All right. Let's just come back at 2:15,
12 okay? Will you be prepared to make your argument then?

13 MR. SHANNON: Yes, Your Honor.

14 THE COURT: All right. 2:15 it is.

15 (A recess was taken.)

16 THE COURT: Now, Counsel, you wanted to address me.

17 MR. SHANNON: Yes, Your Honor. If the Court would
18 allow, I would appreciate it.

19 THE COURT: Go right ahead.

20 MR. SHANNON: Thank you. May it please the Court.
21 Your Honor, Rex Shannon for the State.

22 The State submits that Chief Justice Randolph's
23 dismissal alters the legal posture of this case in two
24 significant ways. And I just wanted to walk through those,
25 because I know the Court had sent us a question the week

1 before last, I believe, indicating the Court would like some
2 clarification from the parties -- or at least a statement of
3 the parties' respective positions relative to what position
4 we take in terms of the continued effect or ineffectiveness
5 of the TRO that's in place now based on Chief Justice
6 Randolph's dismissal, so that's what I'd like to respond to
7 now, Your Honor.

8 THE COURT: Go right ahead.

9 MR. SHANNON: Your Honor, first, because the Chief
10 Justice was dismissed on judicial immunity grounds, this
11 Court should immediately dissolve the TRO that's blocking
12 these judicial appointments under House Bill 1020.

13 Secondly, Your Honor, because none of the remaining
14 defendants has the authority to make the challenged
15 appointments under 1020, this Court now lacks subject matter
16 jurisdiction over the judicial appointment claim, and I'll
17 explain that.

18 Your Honor, on May 12th this Court entered a TRO
19 against Chief Justice Randolph, and that original TRO was
20 directed solely to him. It temporarily restricted him from
21 making any appointments under House Bill 1020 pending a
22 hearing and a ruling on his judicial immunity defense.

23 On May 22nd, Your Honor, this Court held a hearing on
24 the Chief Justice's motion to dismiss and the plaintiffs'
25 renewed motion for a TRO.

1 On May 23rd, Your Honor, over the State's objection,
2 this court entered an order extending the TRO. That
3 second TRO was again directed solely to Chief Justice
4 Randolph. Again, it temporarily restricted him from making
5 any judicial appointments under 1020 until the Court rules
6 on the plaintiffs' motion for a preliminary injunction,
7 which at that time had not yet been filed.

8 On May 24th, Your Honor, the plaintiffs filed a motion
9 for preliminary injunction, a focus solely on 1020's
10 judicial appointment provision.

11 On May 31st, Your Honor, the plaintiffs voluntarily
12 dismissed Governor Reeves, effectively confessing his motion
13 to dismiss on standing and sovereign immunity grounds.

14 And on June 1st, Your Honor, the Court entered its
15 order dismissing Chief Justice Randolph from this action on
16 judicial immunity grounds.

17 As the Chief Justice's counsel has rightly pointed out,
18 in that order the Court found that, quote, "judicial
19 immunity is an immunity from suit," end quote. The Court
20 further found that, quote, "this doctrine of judicial
21 immunity shelters judges from lawsuits, whether declaratory
22 or injunctive, when the judge within his jurisdiction
23 performs a judicial act or is about to perform a judicial
24 act," end quote. And on that basis, Your Honor, the Court
25 granted the Chief Justice's motion to dismiss, holding that

1 he is, quote, "dismissed from this litigation because of
2 judicial immunity." So that's where we stand.

3 Your Honor, there can be no question that Chief Justice
4 Randolph presently stands dismissed from this lawsuit. He
5 is no longer a party to this action. Pursuant to the
6 Court's order of dismissal, he has judicial immunity from
7 both declaratory relief and injunctive relief. All of that
8 can only mean that this Court no longer has personal
9 jurisdiction over Chief Justice Randolph and respectfully,
10 Your Honor, cannot enjoin him from making the challenged
11 appointments.

12 It also means that there's nobody left in this
13 litigation who can be enjoined to halt the appointments
14 required under House Bill 1020. Your Honor, House Bill 1020
15 expressly commands the Chief Justice to make the
16 appointments at issue in this case. The bill does not
17 require or authorize anyone else to make those appointments.
18 The only defendants left in this case at this time, Your
19 Honor, are the Commissioner of the Department of Public
20 Safety, the Capitol Police chief, and the Attorney General.
21 None of these people is authorized to make the challenged
22 judicial appointments under House Bill 1020 or otherwise.
23 Only the Chief Justice is empowered to make those
24 appointments.

25 Your Honor, the Fifth Circuit has been abundantly clear

1 that, quote, "a state official cannot be enjoined to act in
2 a way that is beyond his authority to act in the first
3 place," end quote. I know Your Honor is familiar with that
4 line of cases. That's *Okpalobi v. Foster*, 244 F.3d 405.

5 Your Honor, that means that any alleged injury stemming
6 from these challenged judicial appointments is not
7 redressable by the remaining defendants. Your Honor, it is
8 settled law under *Lujan* that redressability is an essential
9 element Article III standing. There is no question about
10 that. It is also well settled that, quote, "'A plaintiff
11 must demonstrate standing for each claim he seeks to press'
12 and have 'standing separately for each form of relief
13 sought,'" end quote. That's *Latitude Solutions, Inc. v.*
14 *DeJoria*, 922 F.3d 690. That's a 2019 Fifth Circuit case.

15 Your Honor, the U.S. Supreme Court recently reaffirmed
16 that injunctive relief does not operate on legal rules in
17 the abstract. Thus an injunction cannot be directed at a
18 statute. It's got to be directed at the official who is
19 specifically charged with enforcing the statute. That is
20 *California v. Texas*, 141 S.Ct. 2104, and that's a 2021 U.S.
21 Supreme Court case.

22 Your Honor, as things stand now, there is no defendant
23 left in this case who can be enjoined to halt these judicial
24 appointments. Even if this Court were to declare that
25 1020's appointment provision is unconstitutional, the Chief

1 Justice could still make the same appointments under
2 Mississippi Code Section 9-1-105, Subsection 2, which the
3 plaintiffs have not challenged. Your Honor, the plaintiffs
4 simply cannot establish redressability in connection with
5 their judicial appointment claim for injunctive relief, and
6 thus they lack standing to pursue that claim.

7 Your Honor, the same goes for their judicial
8 appointment claim for declaratory relief. Your Honor,
9 standing to seek a declaratory judgment is governed by the
10 same requirements set forth in *Lujan*, including the
11 requisite element of redressability. That's *BroadStar Wind*
12 *Systems Group, LLC v. Stephens*, 459 Fed.Appx. 351. That's a
13 Fifth Circuit 2012 case.

14 Your Honor, it is well settled that under the
15 Declaratory Judgment Act, a federal court may only declare
16 the rights and other legal relations of parties in a case of
17 actual controversy in the Article III sense. That's *Texas*
18 *Central Business Lines Corp. v. City of Midlothian*, 669 F.3d
19 525. That's a Fifth Circuit case from 2012.

20 Your Honor, where the defendant would be powerless to
21 effectuate a requested injunction, quote, it follows that
22 declaratory and injunctive relief directed to a defendant
23 will not redress the plaintiff's injury, end quote, and the
24 plaintiff lacks standing to pursue either form of relief.
25 That's *KP v. LeBlanc* 729 F.3d 427. It's a 2013 Fifth

1 Circuit case.

2 Your Honor, the bottom line here is that since Chief
3 Justice Randolph has been dismissed and since none of the
4 remaining defendants can be enjoined to halt judicial
5 appointments, the plaintiffs lack standing to assert the
6 judicial appointment claim, and that's true as to both forms
7 of relief: declaratory and injunctive. Therefore, the
8 judicial appointment claim should be dismissed, Your Honor,
9 for lack of standing.

10 Additionally, Your Honor, as I alluded to a moment ago,
11 none of the remaining defendants is specifically tasked with
12 making these judicial appointments. Obviously neither the
13 DPS commissioner nor the Capitol Police chief has anything
14 to do with appointing these temporary judges, nor is the
15 Attorney General specifically tasked with appointing these
16 judges. Your Honor, the case law is clear in the Fifth
17 Circuit that a general duty to enforce state law is not
18 enough to get around sovereign immunity. Your Honor, for
19 the plaintiffs to overcome sovereign immunity where the
20 Attorney General is concerned, she would have to have a
21 particular duty under 1020 to enforce the appointment
22 provision and a demonstrated willingness to exercise that
23 duty. Neither of those things exist here, Your Honor.

24 She would also have to have the ability to compel or
25 constrain Chief Justice Randolph to refrain from making

1 these appointments, but she lacks that authority as well.
2 Your Honor, these are two separates branches of government.
3 The Attorney General has no authority over the conduct of
4 the Chief Justice relative to judicial appointments. At
5 best, Your Honor, the Attorney General can give advice, but
6 the Fifth Circuit has made it clear that simply offering
7 advice, guidance, or interpretive assistance does not
8 constitute compulsion or constraint in the sovereign
9 immunity context. That's *Richardson v. Flores*. That's 28
10 F.4th 649. That's a 2022 Fifth Circuit case.

11 Therefore, as a matter of law, Your Honor, and without
12 question, the judicial appointment claim is further barred
13 by sovereign immunity given a dismissal of Chief Justice
14 Randolph. We cite *Texas Alliance for Retired Americans v.*
15 *Scott*, 28 F.4th 669. That's a 2022 Fifth Circuit case.

16 So for two reasons, Your Honor, lack of standing and
17 sovereign immunity. This Court lacks subject matter
18 jurisdiction as to the judicial appointment claim given the
19 dismissal of the Chief Justice, and we submit that that
20 claim should be dismissed. Your Honor, at the very least,
21 the dismissal of the Chief Justice totally forecloses any
22 consideration of injunctive relief relative to these
23 judicial appointments.

24 To respond briefly to the plaintiffs' arguments that
25 they have made here, Your Honor, they said the Court's order

1 should be read to dismiss the Chief Justice only as to their
2 1020 Section 1 claim for injunctive relief and not as to any
3 claim for declaratory relief under Section 1 or their claims
4 for relief under Section 4 of House Bill 1020.

5 But, Your Honor, that is not what the Court held in its
6 order. Rather, the Court held that the Chief Justice is
7 dismissed from this action entirely due to judicial
8 immunity, which the Court held is immunity from suit and one
9 that applies to both claims for injunctive relief and claims
10 for declaratory relief.

11 Your Honor, the plaintiffs have cited no authority to
12 support entering an injunction against the judge who has
13 been dismissed outright on judicial immunity grounds. If
14 that were permissible, Your Honor, then of what effect is
15 the Court's dismissal order? It wouldn't make sense to
16 immunize a judge against a claim for injunctive relief if
17 the Court could simply dismiss him and then turn around and
18 enjoin him once he is a nonparty.

19 Your Honor, if there is any question about who can be
20 subject to an injunction or a restraining order, that
21 question is answered by Federal Rule of Civil Procedure
22 65(d) (2) .

23 Rule 65(d) (2) says that any injunction or restraining
24 order binds only the following people who receive actual
25 notice of it by personal service or otherwise: number one,

1 the parties; number two, the parties' officers, agents,
2 servants, employees, and attorneys; and number three, other
3 persons who are in active concert or participation with any
4 of the parties or the parties' officers, agents, servants,
5 employees, and attorneys.

6 Your Honor, Chief Justice Randolph is no longer a
7 party. He is not an officer, agent, servant, employee, or
8 attorney of any party remaining in this lawsuit, and he is
9 not acting in concert with any of those people. Your Honor,
10 there is no authority under Rule 65 or otherwise to support
11 enjoining him as a nonparty.

12 Your Honor, the plaintiffs have also argued that Chief
13 Justice Randolph can still be subject to an injunction
14 because the order of dismissal wasn't certified as a final
15 judgment pursuant to Rule 54(b). But, Your Honor, they
16 cited no authority to support the notion that a party still
17 remains subject to a court's injunctive power after they
18 have been dismissed solely because the dismissal order was
19 not a Rule 54(b) order.

20 Your Honor, parties are frequently dismissed in
21 multi-party litigation for lack of personal jurisdiction
22 without Rule 54(b) certification. There would be no point
23 in such dismissals if the lack of a Rule 54(b) certification
24 somehow meant that the Court retained personal jurisdiction
25 over the dismissed party.

1 Again, Your Honor, of what effect is the dismissal of
2 the Chief Justice on judicial immunity grounds if he can
3 somehow still be subject to the Court's injunctive power in
4 the same case? It makes no sense.

5 Your Honor, what the plaintiffs are asking this Court
6 to do is to presume that they are entitled to a declaratory
7 judgment and, on the basis of that presumption, to enjoin a
8 nonparty from taking an action commanded by state law until
9 the Court rules on the constitutionality of that law.

10 Your Honor, that is the equivalent of a preliminary
11 injunction that would block an important feature of House
12 Bill 1020. Even if there were somebody left in this lawsuit
13 for this Court to enjoin, that would be tantamount to
14 granting these plaintiffs' extraordinary relief against a
15 duly enacted state law without regard to the governing
16 standard, which they have not met. At best, Your Honor, it
17 totally skips over any consideration of their motion for
18 preliminary injunction.

19 Your Honor, in conclusion, the 28-day TRO period
20 provided for in Rule 65 has already been exhausted. Neither
21 Rule 65 nor the governing case law can possibly support
22 extending this TRO any further. This notion that there is
23 some grave danger lurking in the possible appointment of
24 several temporary judges in Hinds County finds no support in
25 this record. It certainly is no reason to maintain an

1 improper TRO.

2 Your Honor, respectfully, the State would ask the Court
3 to consider the prejudice to the people of the State of
4 Mississippi that is inherent in the continued enjoinder of a
5 duly enacted state law by a federal court.

6 Your Honor, since the Chief Justice has now been
7 dismissed, there is no one left to enjoin against making
8 these appointments. Thus there is no legal basis for
9 injunctive relief to block these appointments.

10 For all of the reasons I have discussed, Your Honor,
11 the State respectfully requests that the Court would
12 immediately dissolve the TRO, deny the plaintiffs' motion
13 for preliminary injunction without further hearing, and
14 dismiss the plaintiffs' judicial appointment claim.

15 If the Court is nevertheless inclined to consider the
16 plaintiffs' motion for preliminary injunction, Your Honor,
17 then the State submits that the issue it presents should be
18 resolved without delay. The motion for preliminary
19 injunction is fully briefed. The record for PI purposes is
20 well developed. The plaintiffs have advised the Court in
21 writing that they do not intend to call any witnesses.

22 Your Honor, the State needs resolution of this issue.
23 We are all here before Your Honor today. If and only if the
24 Court is of the view that a preliminary injunction can still
25 be entertained notwithstanding Chief Justice Randolph's

1 dismissal, then, respectfully, Your Honor, we would ask the
2 Court to take up the PI motion, and hear any oral argument
3 on it.

4 Your Honor, they have mentioned -- the plaintiffs'
5 attorneys earlier before we broke for lunch, they made some
6 proposal that, as I understood it, would involve what they
7 called a tentative declaratory decree. Your Honor, there is
8 no authority to support such relief. Certainly they have
9 cited none. What they call a tentative declaratory decree
10 is in effect a preliminary injunction. And, Your Honor, the
11 plaintiffs have not made and cannot make the requisite
12 showing for preliminary injunction.

13 So, Your Honor, at this time, unless the Court has any
14 questions, we would ask that the Court proceed to dissolve
15 the TRO and deny any further consideration of the request
16 for preliminary injunctive relief.

17 THE COURT: Does the statement by the plaintiffs'
18 counsel that there are still some unresolved claims against
19 the Chief Justice figure within your analysis?

20 MR. SHANNON: Your Honor, I would say that the State
21 takes no position substantively on the arguments that the
22 Chief Justice has made. The motion that was filed by the
23 plaintiffs was a motion for clarification.

24 Reading Your Honor's order, there is nothing in that
25 order that is unclear or ambiguous. In the argument that we

1 have made today, the State is assuming that the Court means
2 what it says in its order of dismissal and that no
3 circumstances, I don't believe, could fairly be construed as
4 anything but a dismissal of the Chief Justice in -- from all
5 claims asserted against him in this lawsuit, Your Honor.

6 THE COURT: Well, plaintiff counsel mentioned at the
7 podium shortly -- I mean, just a while ago that there were
8 some unresolved claims against the Chief Justice. Do you
9 agree that there were unresolved claims?

10 MR. SHANNON: Your Honor, the State takes no position
11 on that question. The Chief Justice is represented by
12 separate counsel and can certainly represent himself in that
13 regard. I'm just reading the Court's order that the Chief
14 Justice was dismissed in assuming that that is, in fact, the
15 case. And if it is, Your Honor, for the reasons I have
16 argued here today, there is no reason for this Court to
17 reach the preliminary injunction motion, because there is no
18 one left in the case that can be enjoined legally.

19 THE COURT: And then you have argued sovereign
20 immunity.

21 MR. SHANNON: Yes, Your Honor.

22 THE COURT: Is that your primary argument?

23 MR. SHANNON: I wouldn't say primary, Your Honor. I
24 would put it on equal footing with standing. They both go
25 to subject matter jurisdiction.

1 THE COURT: Okay. Those are the two claims that you
2 are making now on these defenses, standing and sovereign
3 immunity?

4 MR. SHANNON: That is correct, Your Honor.

5 THE COURT: All right. Thank you so much.

6 MR. SHANNON: Thank you, Your Honor.

7 THE COURT: Response?

8 MR. CLINE: Thank you, Your Honor.

9 A lot of what Mr. Shannon said, as I mentioned before,
10 we agree with, and it was kind of nice of him to make that
11 argument for us. We agree that without the Chief Justice,
12 we cannot get whole relief against the remaining defendants
13 in this case, and that is a reason why the Chief Justice
14 needs to stay in this case as a nominal party on our
15 Section 1 claim.

16 MR. NELSON: Your Honor, I still can't hear the
17 presentation.

18 THE COURT: Okay. You need to speak more loudly.

19 MR. CLINE: I apologize.

20 THE COURT: Okay. But thus far, what you have said is
21 that you agree to an extent with Mr. Shannon's remarks that
22 in the absence of the Chief Justice, the plaintiffs cannot
23 get full relief. Thus you ask the Court to keep the Chief
24 Justice in this lawsuit as a nominal party.

25 MR. CLINE: Exactly right.

1 THE COURT: All right. And now, that is where you
2 stopped at the time of the objection.

3 Can you tell me what your authority would be to retain
4 him here as a nominal party?

5 MR. CLINE: So the way that he would remain in this
6 case, it is an unusual posture here, because the State --

7 MR. NELSON: I still can't hear him, Your Honor. Will
8 you please speak into the microphone? If -- that would be
9 helpful.

10 THE COURT: Okay. See if we can cut it up some.

11 MR. CLINE: I'll do my best. I'll angle it here.

12 THE COURT: Okay.

13 MR. CLINE: Okay.

14 We have an unusual posture here where the Chief Justice
15 need not make argument on the merits, because the State,
16 through the AG's Office, has intervened here and
17 interposing, because they have this relationship with the
18 other remaining defendants. So they will be making the
19 remaining arguments in this case on the merits. So there is
20 no need for the Chief Justice to do anything other than stay
21 as a nominal party.

22 They could be -- the Chief Justice could remain as a
23 full party, Your Honor. The authorities I have cited before
24 say that this Court has the authority to issue a declaratory
25 relief, to issue injunctive relief against him

1 notwithstanding his judicial immunity. But because of the
2 unique circumstances here, he need not do anything besides
3 stay on the sidelines once his presence in this case is
4 resolved, and all further argument on the merits of this
5 case can come from the Attorney General's Office. That's
6 our position on that matter.

7 THE COURT: Explain to me where you find this
8 definition of nominal party so that this Court could order
9 the Chief Justice to so remain in that status and I guess
10 still be subject to the Court's orders. So where should I
11 look for the background on a nominal party?

12 MR. CLINE: So the -- it is a slightly different
13 situation, but the -- I don't have a case in front of me
14 now, but it's the *In re Justices of the Puerto Rico Supreme*
15 *Court* case, I believe. It is from 1982. This was cited in
16 the briefing. Something like 1982. I think it's a Second
17 Circuit case. In that case, they describe the court
18 justices there in their administrative role serving as
19 nominal parties in that case.

20 A larger point that we are trying to make, though, is
21 that he can be a full party in this case. There is no need
22 for him to be, but the law says that he can remain in this
23 part -- is this case and present a defense on the merits as
24 to injunctive relief or declaratory relief notwithstanding
25 judicial immunity.

1 So we are offering that -- we are identifying that even
2 though he can remain in the case as a real, full party, he
3 need not, and he can just be limited to be a nominal party
4 effectively.

5 THE COURT: I am still waiting for some authority that
6 explains to me this whole notion of nominal partyship.

7 MR. CLINE: I can look up the Second Circuit case I was
8 referring to, Your Honor, if Your Honor would like the
9 citation for that.

10 THE COURT: And what does that case say?

11 MR. CLINE: That case was saying -- in that case where
12 the justices of the Puerto Rico Supreme Court had an
13 administrative function, that that was something where the
14 justices were in the case as nominal parties even though the
15 real challenge was to the underlying law that tasked them
16 with that function.

17 THE COURT: What function?

18 MR. CLINE: In that case there is -- I believe it was
19 maybe disciplinary proceedings. But all of this is going to
20 if Your Honor were to go further than what we are asking.
21 Where we're saying is as a -- as a realistic, real-world
22 matter, all of the authorities that we have cited say the
23 Chief Justice can remain in this case as the real party, as
24 a non-nominal party.

25 So I am just trying to allay the Court's concerns about

1 keeping him in here and having to argue these cases on the
2 merits, which is what other judges have had to do. These
3 cases that we have cited to you -- for example, the Fifth
4 Circuit case *Caliste v. Cantrell* that I cited last time I
5 was up at the podium, in that case the state court judge
6 didn't have the benefit of other counsel in that case making
7 his arguments for him. He was the full party. And the
8 Court there, the district court, still granted declaratory
9 judgment against him. That was affirmed on appeal.

10 So there's really nothing stopping the Chief Justice
11 from remaining here as a full party, but that need not
12 concern the Court, because the defense for everything that
13 he has asked to do under H.B. 1020, that defense is being
14 handled by other counsel, who have ably defended the statute
15 thus far.

16 THE COURT: So, again, give me your authorities. Do
17 you have the names of your cases?

18 MR. CLINE: Well, which case, Your Honor?

19 THE COURT: The ones that you are relying upon for
20 nominal partyship.

21 MR. CLINE: So I would point the Court to *Caliste v.*
22 *Cantrell* for this greater proposition. We can set aside the
23 nominal party. I was only using that term to refer to in
24 practice. The Chief Justice would not be asked to
25 participate in this case going forward. *Caliste v. Cantrell*

1 clearly stands for the proposition that a state court judge
2 can be fully involved in the litigation and the defense
3 presented there under what I have referred to before as
4 these exception to the exception under Section 1983 where
5 you are dealing with declaratory relief or injunctive
6 relief, both of which are prospective only, both of which
7 Congress has provided for under 1983.

8 THE COURT: But now this was a case involving real
9 partyship, you said. What about the case that would
10 authorize this Court to retain the Chief Justice here as a
11 nominal party and then have jurisdiction over him? What
12 cases are you citing for that?

13 MR. CLINE: So I have identified a few cases, Your
14 Honor. The -- the nominal status I just meant to be
15 indicative of the real-world impact of it. Plaintiffs have
16 no intention, as I mentioned before, of taking discovery
17 against the Chief Justice. We have no intention of having
18 him interpose, defend the statute that he is charged with
19 implementing. He has no real-world involvement with the
20 rest of this suit once these first preliminary issues are
21 settled out and it is decided whether he stays in the case,
22 so that plaintiffs can get their declaration about the law
23 that he is tasked with implementing.

24 THE COURT: So you don't have any cases?

25 MR. CLINE: Your Honor, I have cited to some cases that

1 go farther than what I am asking this Court to do, and I
2 have cited to the Second Circuit case that is describing
3 nominal party status for judges in that setting.

4 THE COURT: And what is the cite for that case?

5 MR. CLINE: I don't have it in front of me, Your Honor,
6 because what we are asking the Court to do would be not
7 going with this -- we are talking about keeping the Chief
8 Justice in the case technically, officially, illegally, in
9 his full capacity. So this nominal party status that I am
10 referring to is just fully, effectively -- effectively he
11 would not be called upon to act the way that a normal party
12 does.

13 But if a party is normally sued in court, that party
14 has to stand up and vindicate its own rights. Here, of
15 course, the AG's Office has taken that task on, and they'll
16 be defending that -- this case throughout the rest of the
17 litigation. So there is no real-world need for the Chief
18 Justice to continue responding to briefing. You know,
19 counsel for the Chief Justice did not respond, for example,
20 on the merits of our preliminary injunction motion, nor did
21 they need to, because the AG's Office has now presented the
22 State's argument and defense.

23 So this is the -- when I use the term "nominal party,"
24 I am saying effectively, in the real-world, plaintiffs don't
25 anticipate any need for Chief Justice Randolph to have any

1 involvement in this case from this day forward if Your Honor
2 finds that he remains a party to this case on plaintiffs'
3 declaratory judgment claims and remains a party as to
4 plaintiffs' Section 4 claim for injunctive relief.

5 THE COURT: Under what Rule of Civil Procedure would I
6 find a description of this nominal party?

7 MR. CLINE: Your Honor, I'm not aware of a nominal
8 parties section of the Rules of Civil Procedure. As I am
9 trying to explain, he would technically remain a full party.
10 The only nominal status would be that effectively he would
11 not be called on to have any further involvement in the
12 case. He would remain on the docket, of course. If
13 something came up about his party status, which we don't
14 anticipate, perhaps then he would be required to respond.
15 But on the merits, no response from him is needed.

16 THE COURT: I don't have a brief on this point, so I
17 don't have before me these cases that you are talking about.

18 MR. CLINE: Yes. And I apologize, Your Honor. Some of
19 what Mr. Shannon was mentioning just now, he is referring to
20 dismissing this case for lack of subject matter
21 jurisdiction. That was not presented by motion, so
22 plaintiffs have not had the response -- have not had the
23 opportunity to respond to those arguments that are being
24 made.

25 THE COURT: But you said that you have read some cases

1 which provide the backdrop for nominal partyship?

2 MR. CLINE: Yes. And if we had the opportunity to
3 respond in our papers, we could also walk through each of
4 the individual steps remaining in this case where a party
5 would normally be called upon to have direct involvement in
6 a case and where plaintiffs would not involve the Chief
7 Justice.

8 As I mentioned, we have no intentions of taking
9 document discovery from him, no intentions of taking
10 depositions, no intentions of calling him at trial, no
11 intentions of having him respond on the merits. So there is
12 really no real-world involvement anticipated for Chief
13 Justice Randolph going forward in this matter.

14 THE COURT: Okay. All right. Next point.

15 MR. CLINE: Okay. So if I may respond to some of the
16 other points that were raised here. So Mr. Shannon was
17 pointing to some of the statements in Your Honor's order. I
18 would just like to clarify and provide a little bit more
19 context for some of those statements. There is a statement
20 about judicial immunity, providing immunity from suit. That
21 just is referring to immunity from suit for damages. It is
22 an absolute immunity; if someone sues a judge for damages,
23 they can invoke absolute judicial immunity. If that
24 immunity defense is denied, they can take immediate appeal.

25 That's not the case for a claim for prospective

1 injunctive or declaratory relief. For either of those,
2 judicial immunity may continue to exist, but it does not
3 attach to those types of relief. This is what we were
4 discussing before the lunch break. That's why Congress
5 partially reversed the Supreme Court's decision in
6 *Pulliam v. Allen*, that case from the Supreme Court from the
7 1980s, to specifically provide the circumstances under which
8 declaratory relief may not be available, may have been
9 ineffective. And in those cases, injunctive relief would be
10 provided.

11 Another point is -- I believe this point may have come
12 up in the papers from all other sides of the V here. But
13 there was a comment in Your Honor's order about judicial
14 immunity applying whether to declaratory or injunctive
15 relief. Plaintiffs would just submit that the cases cited
16 do not make that point as to declaratory relief. That issue
17 was not presented to Your Honor. The *Holloway* case that is
18 cited, Your Honor has already went through how there is
19 judicial immunity as to the damages that were at issue in
20 that case. On page 525 of that case, the Fifth Circuit said
21 that there is no judicial immunity as to declaratory or
22 injunctive relief. And that case predated the 1996
23 congressional amendments to 1983.

24 So the point in that case as to injunctive relief is no
25 longer completely accurate, because now injunctive relief is

1 only available if declaratory relief was not available or is
2 not effective. But the point about declaratory relief
3 continuing to be available, that still stands.

4 We agree with the Attorney General's Office that the
5 Chief Justice is the only one who could provide complete
6 relief regarding the question of -- that single moment in
7 time that I mentioned at which the appointments are made.
8 We don't agree that any injury at all would only be
9 redressable by the Chief Justice. There are consequences
10 that flow from the appointment of these judges to that
11 court, which, if we're not able to prevent that from
12 happening, there are potential partial remedies that may be
13 available.

14 That is all down the road, and currently where we stand
15 today, based on the parties here and the briefing that is
16 before you, the only way plaintiffs can get complete relief,
17 I think we all agree, at least the AG's Office and
18 plaintiffs, would be by keeping the Chief Justice in the
19 case and getting that declaratory or injunctive relief just
20 against him.

21 There was a comment made about the Chief Justice being
22 able to make the same exact appointments under 9-1-105.
23 Your Honor detailed in the order at pages 5 through 8 the
24 differences between 9-1-105 and 1020 Section 1. The
25 Section 1 provision provides 3.5-year terms, requires no

1 finding of an emergency, no finding of a backlog. It is not
2 limited to cases so pending. The 9-1-105 is about cases so
3 pending. 1020 also, in a different section that we haven't
4 touched on, has the Chief Justice appoint a court
5 administrator who would be responsible for managing the
6 docket of these new judges.

7 So these judges aren't just picking up administrative
8 tasks that the current Hinds County Circuit Court judges
9 have not addressed. These judges would be getting their own
10 cases assigned to them by this new court administrator, who
11 would be coming in and reviewing cases as they come into the
12 court. So all we need here, we think, is a single
13 difference between these two authorities to show that
14 their -- had been 1020 is not superfluous. We think we have
15 a number of differences, and I'll leave it at that.

16 The Attorney General's Office has explained, I think --
17 I think we are in agreement here that Your Honor's order,
18 just the relief portion of it, the tension between that
19 relief and the arguments that are preceding it based on the
20 motion as it was presented, that exactly explains why we
21 think clarification is warranted.

22 As I mentioned before the break, we've teed that up at
23 this time. Before Your Honor considers entering partial
24 final judgment, before Your Honor makes a decision on the
25 TRO, we recognize that this is a somewhat unusual motion,

1 but given the other things happening in this case, we
2 thought it was important to bring it to your attention now
3 before waiting for a final judgment and then asking you to
4 reconsider only at that time.

5 I could say a couple of points briefly on the merits,
6 but I think the preliminary injunction maybe should wait for
7 if Your Honor wants another hearing on it, if Your Honor
8 wants to talk about it later this afternoon. We could talk
9 about it at this time. There is certainly no prejudice to
10 the residents and the occupants -- the people who are in or
11 visiting Hinds County. There is certainly no prejudice to
12 them from continuing the TRO to stop the appointment or
13 reappointment of these four judges that are anticipated by
14 had been 1020.

15 As we mentioned in the papers, three of the four
16 previously appointed judges are still on the bench. They
17 are considering the cases that have been assigned to them
18 still, and they will continue to go through those cases.
19 And this case, we believe, we hope, should be resolved
20 before they step down. So there should be no injury in the
21 meantime.

22 With respect to the tentative declaratory decree that I
23 mentioned before the break as the first and clearest option
24 before this Court, plaintiffs agree that we would need to
25 make the preliminary injunction showing to get that sort of

1 relief, and we believe we have. We are not trying to take
2 on a lesser burden for that. We believe it would be the
3 same burden as the preliminary injunction. As I stated
4 before, same findings of fact, same conclusions of law, just
5 a different relief at the end, the milder form of
6 declaratory relief.

7 And I believe that is all the points I had to make in
8 response. If Your Honor has any questions for me, I would
9 be happy to answer them.

10 THE COURT: I do not. Thank you so much.

11 MR. CLINE: Thank you.

12 THE COURT: Mr. Shannon?

13 MR. SHANNON: Your Honor, if I may just briefly make a
14 couple of quick points in response to that. First of all, I
15 want to be clear that the state executive defendants have
16 taken no position on keeping Chief Justice Randolph in this
17 case. We are simply reading the Court's order of dismissal
18 at face value. The substantive arguments for and against
19 keeping him or letting him out of the case, the three state
20 executive defendants have not taken a position on that. The
21 Chief Justice is well represented, has made his own
22 arguments there.

23 What we are saying is reading the Court's order at face
24 value, he has been dismissed, and we have argued as to what
25 the effect of that dismissal should be on the standing TRO

1 that is in place now and the assertion of continued
2 entitlement to injunctive relief.

3 Secondly, Your Honor, counsel opposite indicated they
4 were not aware of the arguments on standing and sovereign
5 immunity. I would just point out, those were, in fact,
6 asserted in response to Your Honor's email inquiry, and they
7 were served on counsel opposite. They were filed in the
8 record in letter format at Docket 46-1.

9 All of the cases that I cited orally just now were not
10 in that letter, but the principal cases were identified, and
11 the substantive arguments were made that in light of the
12 Chief Justice's dismissal, it is the state executive
13 defendants' position that this Court no longer has subject
14 matter jurisdiction for lack of standing and the sovereign
15 immunity issue that are created by his dismissal.

16 And, Your Honor, again, as to this notion of some
17 tentative declaratory judgment, they have cited no
18 authority. You heard just now, he didn't provide you with
19 any rule or case citation or any legal authority that would
20 support that kind of relief. There is no such thing as a
21 tentative declaratory judgment, Your Honor. What they are
22 asking for is in effect a preliminary injunction. They want
23 to talk about harm. Your Honor, this state -- the State of
24 Mississippi right now is going on a month under a TRO on a
25 validly enacted statute passed by its state legislature,

1 which are the people's elected representatives. There is
2 harm to the State of Mississippi for as long as this
3 injunction stays in place.

4 We would just ask the Court, respectfully, Your Honor,
5 to remain aware of that and to proceed to dismiss this --
6 deny the motion for preliminary injunction and certainly
7 dissolve the TRO that is in effect now.

8 Thank you, Your Honor.

9 THE COURT: All right.

10 MR. NELSON: We have nothing further, Your Honor,
11 unless Your Honor has some questions for us.

12 THE COURT: I do not. I will do a short order on these
13 matters and get it out to you as soon as I can. But I will
14 do a written order.

15 Now then, that brings us to -- let's see.

16 MR. CLINE: Your Honor, may I ask a question?

17 THE COURT: Go ahead.

18 MR. CLINE: Plaintiffs' reply in support of our motion
19 for clarification should be due on Friday. Would Your Honor
20 like that sooner so you can consider that when you issue
21 this order?

22 THE COURT: You will have it done by Friday?

23 MR. CLINE: That's right.

24 THE COURT: Friday will be okay.

25 MR. CLINE: Oh, my cocounsel is reminding me, we also

1 have nine days to respond to the motion for partial final
2 judgment, 54(b) certification. Do we still have that time,
3 Your Honor?

4 THE COURT: Nine days -- hang on one second.

5 (An off-the-record discussion was held.)

6 THE COURT: How much time are you saying you need?

7 MR. CLINE: We can try to have a response for that on
8 Friday as well, Your Honor. It might be more realistic if
9 we did it over the weekend so Your Honor could consider this
10 all together on Monday. Would that be amenable?

11 THE COURT: You said you would have it by Friday?

12 MR. CLINE: Friday if needed, Your Honor.

13 THE COURT: That will be fine.

14 MR. CLINE: All right. Thank you.

15 THE COURT: Now, then, do we have anything else
16 involving the Chief Justice? I don't believe we do. In
17 that case, then, we don't have anything else concerning the
18 Chief Justice today, so if you wish to be excused, then you
19 are certainly welcome to stay here. But if you need to take
20 care of some other judicial business, then you can be
21 excused.

22 JUSTICE RANDOLPH: May I approach and speak to the
23 Court?

24 I have already --

25 THE COURT: Go ahead.

1 JUSTICE RANDOLPH: Your Honor, I have already packed my
2 bag to study tonight. I was just looking at a list of the
3 things I have to do that I am not getting done, and all I
4 hear over here is continue, can we do this, can we do that.
5 Maybe we may change our -- we may add parties. We may do
6 this. We may do that.

7 The young lady this morning talked about potential
8 something. I forget what it was. I wrote it down. And
9 this whole thing is about potential. I do have duties to
10 do. But in light of them getting up here and saying things
11 that are not true, then I am going to stand here so that I
12 can adequately prepare and defend myself as long as it
13 takes. That is just the principle for me.

14 It's easy for him to talk about nominal parties. He is
15 sitting there getting paid to do that. I'm not. I'm paid
16 to adjudicate cases. And he has not identified a single
17 case to this Court in a time period and cannot. And I don't
18 know what he is up to, but I know he made some
19 misrepresentations earlier today about me vetting judges and
20 stuff like that, which he has no concept of what I do or I
21 don't do.

22 The one thing I did want to clear up for the record was
23 this morning I said 1500 and something cases. While I was
24 at my lunch hour, I verified it. The number is 1593 cases
25 that I have appointed. I have also got with me, and I'll

1 present a copy to the Court as an exhibit, of those
2 1593 cases. They involve almost every county in this state,
3 and the leading county of getting substituted judges is
4 south of us. It's not Hinds County. Hinds County is number
5 two. Harrison County is number three. So this whole idea
6 about Hinds County being separated.

7 I also have a copy of the text I earlier mentioned to
8 the Court, which I have produced to the House Judiciary
9 Committee. And in the other proceedings, they were showing
10 YouTubes of me as evidence to support affidavits signed by
11 Mr. McDuff that I said such and such in front of a senate.
12 So I am sure there is a YouTube proceeding out there. Well,
13 I introduced a copy of a text that was sent to four people.
14 Four justices -- four judges who had been appointed in Hinds
15 County. Two of them were former Supreme Court justices,
16 Chandler and Dickinson, and the other two was to Isadore
17 Patrick, former circuit judge, and to Betty Sanders, former
18 circuit judge. And for the purposes of the record, one
19 black female, one white female, and two Supreme Court
20 judges. That was the four people I supported.

21 In addition to that, I substituted -- and here I will
22 ask to introduce the exhibit for the record, is a letter
23 from Denise Owens in the chancery court of Hinds County
24 where she is thanking me for appointing substitute judges.
25 And those judges, once again, were black and white. This

1 case is about discrimination, as I understand it. Never
2 have been sued for it. But in that -- in Hinds County
3 Chancery Court, Patricia Wise was appointed and William
4 Singletary, both of them former judges in this county, one
5 black, one white, one female, one male.

6 I don't even think about things like that, because I
7 talk to judges, and we sort of decide together. But you can
8 see from these -- and I will mark as an exhibit that email.
9 But I shouldn't have to keep coming back, and the reason I
10 say this is, you entered an order. If he wants to raise all
11 these things about nominal party, then raise it on appeal.
12 Just raise it on appeal and convince somebody else that your
13 order failed to address what was in that complaint. Because
14 the complaint keeps changing even as late as today, and all
15 I do is more time, more time.

16 And in the meantime, I have got to get ready. I think
17 there is a motion for recusal on me on the Supreme Court
18 pending that I have got to address. There is also the full
19 hearing on -- for the full court on July 3rd got to get
20 ready for. The bar comes right after that. And it is just
21 on and on.

22 So, yeah. There is a lot of things I would rather be
23 doing than sitting around waiting for them to fumble through
24 their papers and try to keep the Chief Justice in court, and
25 I imagine it has something to do with that motion for

1 recusal that I see in the other court. That is what --
2 because these cases were filed three days apart. And I have
3 thought from the very beginning that these cases were
4 brought collectively in a way, one in federal, one in state.
5 One charges discrimination; one didn't. One did 1983; one
6 didn't. Trying to keep all options open. So that is what I
7 have been facing. So I am not just working on this case.

8 And I can't -- look, I practiced law for 40 years. I
9 have tried cases in 14 different states, federal and state
10 cases, and I have never seen a circus like this one. You
11 ruled, they didn't like it, and now we are coming up with
12 imaginary motions to reconsider and things like that that
13 are not bound by the rules. And why do we have to keep
14 responding?

15 I appeal to the Court that you make a decision. But if
16 they don't like it, if I don't like it, somebody -- moving
17 forward, as far as the 54(b), you wait two or three days or
18 whatever time they want, that is no big issue. But I am
19 actually in fear of leaving this room and listening -- and
20 hearing something that I know not to be true, which will
21 affect other things I'm involved in. So that is where I am
22 left.

23 THE COURT: All right. Stand right there.

24 Terri, let me have that document he has. I want you to
25 get that document he has.

1 JUSTICE RANDOLPH: And if I can -- I could put it up on
2 the screen. Let me get the other document that I mentioned,
3 and I will hand it to her if you wait one second.

4 And I'll give y'all copies. I have copies for
5 everybody.

6 THE COURT: Now -- okay. Terri, let me have that one.
7 He says he has copies for everybody else.

8 It's a different document?

9 JUSTICE RANDOLPH: This is the appointments. 1593
10 appointments that have been made from February 1st, 2019,
11 when I become Chief Justice, through May 31st of this year.
12 That's this document.

13 THE COURT: Okay.

14 JUSTICE RANDOLPH: It is, like, three pages long, and
15 it identifies each county, how many appointments were made
16 in counties, and that type of thing.

17 THE COURT: Hold on just one moment. Do they have
18 copies of all of these?

19 JUSTICE RANDOLPH: I am going to furnish them to them.
20 I have got them on my desk. Would you like for me to get
21 them right now? I will.

22 THE COURT: Yes, sir, if you will.

23 JUSTICE RANDOLPH: And I have one more. And I'll hand
24 to them as well three pages of the text that was sent to me
25 from Tomie Green, senior judge of Hinds County at that time.

1 It was sent to Justice Jess Dickinson, Justice David
2 Chandler, Judge Betty Sanders, and Judge Isadore Patrick.
3 And it's a two-page email and then a separate email, and
4 also talking about why, including the coronavirus pandemic
5 and the effects it was having on Hinds County courts.

6 If you got any questions. I'll keep handing out
7 copies. I just -- we copied these during the lunch hour
8 while you were -- allowed us to go eat lunch.

9 THE COURT: All right. One second. Now, has everyone
10 received a copy of these?

11 JUSTICE RANDOLPH: I'm still handing them out.

12 THE COURT: Now, does that complete the documents?

13 JUSTICE RANDOLPH: It's the things I could gather
14 during the lunch hour today that I thought -- I mentioned to
15 the Court earlier and I wanted to verify that, in fact, what
16 I said earlier to you is supported by documents I told you
17 existed. And that's the reason I ask that they be added to
18 the record.

19 THE COURT: All right. Hang on just one second.

20 Now, are there any objections to the Court making these
21 documents a part of the record?

22 I'll start with the plaintiffs. Any objection?

23 MR. RHODES: No objection, Your Honor. I'm not sure --
24 I think Mr. Shannon might have already had some of this
25 included in the -- in the exhibits that they had submitted.

1 JUSTICE RANDOLPH: That's incorrect. These --

2 MR. RHODES: No objection from the plaintiffs, Your
3 Honor.

4 THE COURT: No objection from the plaintiff.

5 What about Mr. Shannon? Any objections?

6 MR. SHANNON: No objection, Your Honor.

7 THE COURT: All right. And, Counsel, do you have any
8 objections back there?

9 MR. NELSON: No, Your Honor. I think he is doing just
10 fine.

11 JUSTICE RANDOLPH: I'll leave the Court with one last
12 thing. As part of the efforts of the things I need to be
13 working on, last year I gave the Chief Justice Award to
14 James Bell, and the reason I gave that to him is because of
15 his work.

16 And what made me think of it, I ran into the young lady
17 that worked on the case on the elevator during the lunch
18 hour. As a result of the Chief Justice working to resolve
19 and help Hinds County, James Bell and -- along with -- and
20 with the approval of LaRita Cooper-Stokes, who the family
21 asked me to speak at her funeral, and I did, is the kind of
22 relationship that we had, along with her and Bell and
23 Dickinson caused -- and Zack Taylor -- Zack, the Circuit
24 Clerk, resolved and removed from the dockets of the Hinds
25 County county courts 115,000 cases as a result of the

1 efforts that we were doing. That is documented as well. I
2 don't have the document with me. If they want to challenge
3 it, they can have at it.

4 Thank you, Your Honor.

5 THE COURT: One second. Hold it. Chief, one more
6 second.

7 JUSTICE RANDOLPH: Pardon?

8 THE COURT: We are making these a part of the record,
9 but I want you to clarify just one other comment --

10 JUSTICE RANDOLPH: Yes, sir.

11 THE COURT: -- that I know you made out of frustration.
12 But I just want to make sure that you could get a chance to
13 explain your comment, because I have suspicion that it might
14 find itself -- that comment in the news, and I want to make
15 sure that the news will explain exactly what you meant by
16 it.

17 JUSTICE RANDOLPH: Thank you, Your Honor.

18 THE COURT: All right now. And here is the matter that
19 I want you to touch on. You wanted to get up to clarify the
20 record on some points.

21 JUSTICE RANDOLPH: You asked counsel a question that I
22 didn't feel like I could explain to him sufficiently enough
23 to give you the answer, and I asked to approach the bench.
24 That's correct.

25 THE COURT: All right. You also said that you have

1 been frustrated by being involved in this litigation when
2 you didn't think you should have been in this litigation.

3 JUSTICE RANDOLPH: I said that. And I said that
4 because there is no other case in the history of the United
5 States that I can find where this has occurred.

6 THE COURT: And this Court found by its order that you
7 are judicially immune from the lawsuit, and that is the
8 matter that was before me, and I wrote a long opinion on it
9 that agrees with your contention that you are judicially
10 immune. Correct?

11 JUSTICE RANDOLPH: That's correct, Your Honor.

12 THE COURT: And by virtue of that order, you were under
13 the impression that you should have been dismissed from the
14 lawsuit until you saw this motion for clarification,
15 correct?

16 JUSTICE RANDOLPH: Actually, the Court did not even
17 make a request to my lawyer to do a request for
18 clarification. We found out about it when people started
19 responding to it and then found out there had been a
20 request. But you didn't ask us to clarify, and we didn't
21 offer anything except in response to all of these -- again,
22 I have practiced in federal courts all over the United
23 States, and I have never seen a motion for clarification,
24 and I started looking around, and I thought, well, it hasn't
25 changed in the last 19 years. There is still no such thing.

1 But this was just -- was an attempt, so we discussed it and
2 filed what we had to and made the decision to be here.

3 But so the record is absolutely clear, you did not
4 command me to be here today.

5 THE COURT: Now, and finally, in a -- in a moment of
6 exasperation, you made a comment that I want to make sure
7 you can explain to the press --

8 JUSTICE RANDOLPH: All right. Thank you.

9 THE COURT: -- and you said that you had not seen such
10 a circus.

11 JUSTICE RANDOLPH: I was not speaking about this Court.

12 THE COURT: Pardon me?

13 JUSTICE RANDOLPH: I was not speaking about this Court.
14 I was referring to the fact that this theory, this attempt
15 to involve me in litigation on the constitutionality of the
16 statute is nowhere in the books or the manuals, anyplace
17 found anywhere else, and that's the circus that I am
18 referring to that I was brought into this case for reasons
19 that I am sure will never be fully revealed.

20 But nonetheless that is what I am talking about. There
21 is no reason -- it would be like if you had a case up here,
22 Judge. I want to see you too. The case was never about me.
23 It was never about Mike Randolph. It was always about the
24 office of judges all over the states, all over America, to
25 be protected from getting involved so that parties could

1 then seek the recusals and then get them out of the way and
2 then pick and select who they want to try their case and
3 make the judge -- make the judge a participant in
4 litigation -- in litigation. We are supposed to be and I
5 always tried to be a referee. A referee. And that is what
6 we are. And I felt that that is a circus, and maybe that is
7 a bad term. I don't know. I know there is no legal
8 precedent for what is occurring in this case or in the case
9 in state court as well, that I have found, nor have they
10 shown.

11 THE COURT: Now, I have asked a lot of questions here
12 about some of the same things you have asked about, and what
13 I have said is, now that I have heard all of the arguments,
14 pro and con, that I will issue an opinion on these matters.

15 JUSTICE RANDOLPH: Yes, sir.

16 THE COURT: And I will issue my order on it as fast as
17 I can.

18 JUSTICE RANDOLPH: Yes, sir.

19 THE COURT: Now, is there anything else you would like
20 to say?

21 JUSTICE RANDOLPH: I would like -- I am going to go
22 take my seat and see what else happens.

23 THE COURT: All right. Thank you so much.

24 JUSTICE RANDOLPH: Thank you.

25 THE COURT: Inasmuch as there was no objection to the

1 documents, they will be made a part of this record.

2 Now, there is one other motion the Court needs to hear,
3 and that last motion is on the part, I think, of the
4 plaintiffs, and so are you ready for that motion?

5 MR. JOHNSON: Your Honor, the continuation of the
6 motion for consolidation is up next on the docket, but my
7 cocounsel had to step out due to an emergency. I am unclear
8 as to what that emergency is. I would ask for a brief
9 recess, so I can consult with her. Otherwise, I will be
10 prepared to proceed in her absence I suppose.

11 THE COURT: I looked around for her. I didn't see her.
12 And that is why I was going on to something else. But I
13 would prefer to stay with that and finish up what she has to
14 say.

15 MR. JOHNSON: That is --

16 THE COURT: So then can you check and see what her
17 status is?

18 MR. JOHNSON: I will.

19 THE COURT: Go ahead. And we will have a short recess
20 for everybody. I will stay up here, but we are in recess.
21 All right.

22 (A recess was taken.)

23 **BEFORE THE BENCH**

24 THE COURT: Okay.

25 MR. JOHNSON: I think everybody is fine. She had a

1 childcare issue that came up. Her child is fine. There was
2 miscommunication. Ten minutes and we will be ready to go if
3 that's okay with the Court.

4 THE COURT: You sure?

5 MR. JOHNSON: Yes, sir. We will be prepared. I just
6 didn't want to do it in front of the media.

7 THE COURT: Hold it. Since you guys are up here, I get
8 a chance to see you guys up close and personal again. You
9 know, these guys over here, they live over here -- this is
10 not on the record.

11 (An off-the-record discussion was held.)

12 **IN OPEN COURT**

13 THE COURT: We are back on record.

14 Now, I understand that you had an emergency. I don't
15 need to know the gist of it. I think I do. But,
16 nevertheless, you are excused pursuant to that. And so at
17 least -- I said you are. You were excused pursuant to that,
18 so we are ready to go forward now. Is that okay?

19 MS. WU: Yes, Your Honor. I sincerely apologize for --

20 THE COURT: It's fine. That is what I was just saying.
21 It's fine. I have an idea what it was. So are you ready to
22 go forward now?

23 MS. WU: Yes, Your Honor, I am. Thank you. I am going
24 to mess with the podium for one second.

25 THE COURT: Do you need -- do you need a -- you just

1 walked into the courtroom. Do you need a moment to --

2 MS. WU: I am ready to go, and I sincerely appreciate
3 your understanding. Thank you, Your Honor.

4 THE COURT: Okay. Are you ready to go now, though? If
5 not, I will give you a moment or two.

6 MS. WU: I feel good to proceed. Thank you, Your
7 Honor.

8 THE COURT: Okay. Let's go.

9 MS. WU: So, Your Honor, I -- I agreed to proceed with
10 the argument on consolidation bypassing the question of
11 whether the NAACP plaintiffs were going to amend their
12 complaint in the future for the First Amendment issue. I
13 would ask to go back to that for one moment, because I was
14 able to confer with the NAACP plaintiffs during the first
15 break, and they explained what their intent was when they
16 used the term "at this time."

17 In their sentence, plaintiffs do not at this time pray
18 for any relief with respect to that provision. They are, of
19 course, here, so Your Honor may wish to ask them directly.
20 But they conveyed to me that they intended that to be a
21 bookmark for their plaintiffs at a future date after the
22 rules and regulations were promulgated to seek to amend to
23 bring the First Amendment claim at the time their plaintiffs
24 put into action concrete protest plans, which they did not
25 have at the point that they filed their complaint. So I

1 just wanted to let you know that information to the extent
2 it is helpful.

3 THE COURT: Well, this is information that you are
4 relaying from conversations with some of the plaintiffs, so
5 I will prefer to hear it from counsel for the plaintiffs to
6 see then whether they agree with that, and inasmuch as you
7 were providing to me their mental impressions, then I would
8 like to hear them describe it themselves. So I'll have you
9 just step to the side just for a moment while I speak to the
10 plaintiffs in the NAACP case.

11 MS. WU: Yes, Your Honor.

12 THE COURT: All right. Who is going to speak on that
13 behalf?

14 Mr. Rhodes, since you are standing, then I presume then
15 the answer is that you are going to make comments.

16 MR. RHODES: Yes, Your Honor. I was just waiting until
17 I got in front of the mic --

18 THE COURT: Okay. Go right ahead.

19 MR. RHODES: -- to say that I will be speaking on
20 behalf of the NAACP.

21 And counsel was correct as to the reason we put in the
22 complaint that we were not challenging the First Amendment
23 grounds as of yet. And the reason being, at the time we
24 filed the complaint, the plaintiffs -- the NAACP plaintiffs
25 had not had any events scheduled, and the regulations had

1 not been promulgated by the defendants. But we anticipate
2 that once the regulation promulgated and -- the plaintiffs
3 will have some events that they might challenge this summer
4 or this fall, and at that time, we would probably move to
5 amend our complaint.

6 And the reason we didn't raise that First Amendment
7 challenge when we did not have anybody ready to bring any
8 protest or anything, because we knew that the State would
9 raise standing as an issue. So we were waiting until we had
10 standing to bring -- to ask the Court to -- for leave to
11 amend our complaint.

12 THE COURT: I don't have any questions at this time.
13 Now, Mr. Shannon might, but I don't have any -- any other
14 questions on this.

15 Yes?

16 MR. WILLIAMS: I am representing Commissioner Tindell
17 and Chief Luckey as the respondents, Your Honor, and we
18 don't have any questions for Mr. Rhodes on this issue. I
19 think he has been clear that there was a standing issue with
20 trying to make a First Amendment claim when they filed their
21 complaint.

22 THE COURT: All right. Thank you.

23 MR. RHODES: All right. Thank you.

24 THE COURT: Okay. All right then.

25 MR. NELSON: Your Honor, I have just one question about

1 -- between counsel if this has anything to do with judge --
2 Justice Randolph, we want to know. Right now, we don't see
3 any involvement with Judge Randolph.

4 THE COURT: Well, I will let them respond, and with
5 regard to Justice Randolph, is he any ways at all in your
6 theories implicated on this last matter?

7 MR. RHODES: Your Honor, on that First Amendment
8 matter, we have not quite -- we don't anticipate that he
9 would be involved.

10 And just for clarifications, Your Honor, the reason
11 Justice Randolph has been involved up to now is that the
12 NAACP plaintiffs were really challenging the House Bill 1020
13 and Senate Bill 2343 as intentional discriminatory statutes.
14 And -- but we named Justice Randolph as a defendant only
15 because in House Bill 1020 he was commanded to do two
16 things. One was to appoint the four temporary judges under
17 Section 1, and it could appoint judges who had already been
18 appointed under 9-1-105(2). He could appoint them to these
19 temporary seats.

20 And second was the creation of the CCID court. The
21 plaintiffs had three claims in their complaint -- in our
22 complaint. Count 2 of our complaint, which is second, had
23 to do with the appointment of the circuit court judges, the
24 four circuit court judges. The only reason Justice Randolph
25 was named, because the legislature commanded him to appoint

1 them within 15 days.

2 And the other would be Count 3, the creation of the
3 CCID court. When the plaintiffs initially filed their
4 motion for a TRO, it was only dealing with Count 2. It was
5 urgent and necessitous, because the legislation said he had
6 to appoint within 15 days after passage. It passed
7 April 22nd -- 23rd. Fifteen days would have run about
8 May 9th. That's why we moved quickly on Count 2.

9 Count 3, the CCID court does not take effect until
10 January 1, 2024. The House Bill 1020 doesn't take effect
11 until July 1 of this year.

12 And so we did not move, you know, for any injunctive
13 relief on the CCID court. We understand the Court's ruling
14 on the circuit court judges, but we were going to move later
15 on -- and I think we mentioned that at the argument we had.
16 We were going to move later on on the creation of the CCID
17 court prior to that January 1 date when it becomes
18 effective. We were going to ask for injunctive relief on
19 that.

20 Under that part of 1020, Justice Randolph has to
21 appoint the CCID judge. And to take a part of our argument,
22 Your Honor, so Justice Randolph would understand why we were
23 saying -- we asked for declaratory relief and we asked
24 for -- we were going to ask for injunctive relief under
25 Section 4, we didn't do it when we filed that first motion.

1 The plaintiffs maintain that the CCID court is different
2 from the four circuit court judges.

3 And we understand that there is a statute the
4 legislature has had in place for 30 years allowing the Chief
5 Justice to appoint temporary circuit court judges. But we
6 were also going to move for a preliminary injunction later
7 on on Section 4 dealing with him appointing a CCID judge,
8 which is equivalent to a municipal court judge.

9 And what we were going to argue later on, Judge, is
10 that the CCID judge is equivalent to a municipal court
11 judge, and that appointment is not a judicial act but an
12 administrative or executive act, because the statutes in
13 Mississippi -- there is no statute equivalent to 9-1-105,
14 Subsection 2, that allowed the Chief Justice to appoint
15 municipal court judges. And all of those 1500-some
16 municipal court judges that Chief Justice Randolph has
17 appointed, none of them have been municipal court judges.
18 And all of the other temporary judges that have been
19 appointed under 9-1-105, Subsection 2, since 1989, none of
20 them have been municipal court judges.

21 And we maintain that Section 4 is a different
22 category -- a different statute. And the Court's order
23 primarily dealt with the appointments under Section 1. So
24 that is why we were saying we ask for declaratory relief,
25 which we did. In our complaint, we asked that both

1 Section 1 would be declared unconstitutional and we ask that
2 Section 4 be declared unconstitutional. But we haven't
3 taken any action on Section 4 yet, and the First Amendment
4 claim that we would amend later on would not involve the
5 Chief Justice. It is only on the legislature mandating that
6 he makes these judicial appointments. We maintain that
7 there are two categories of appointments. One is plausible,
8 and the Court found plausible, that he could do that
9 appointment as a judicial act, because 9-1-105, Subsection
10 2, he's been doing it for 30 years.

11 Second, CCID judge equivalent to a municipal court
12 judge, never been done, and there is a conflicting statute,
13 Your Honor. The -- there is two conflicting statutes: One,
14 21-23-105, basically states that there should be municipal
15 courts in all courts in the state of Mississippi. And the
16 CCID court is equivalent to a municipal court. 21-23-3
17 states that in a municipality with a population of more of
18 10,000, it is the governing authority of the municipality
19 that shall appoint.

20 And at the end of that, it says in municipalities with
21 a population greater than 50,000, the government authorities
22 may appoint up to ten municipal court judges, and the
23 government authority for the city are the mayor and city
24 council.

25 So we are saying that Section 4 is different from

1 Section 1. We challenged Section 1. The Court found he is
2 immune from any injunctive relief for Section 1. Section 4
3 we hadn't even gotten to yet, and that is why we would ask
4 that he not be dismissed finally from a lawsuit, only
5 dismissed as to Section 1 but not Section 4 yet.

6 THE COURT: What other claim are you saying that he is
7 still a party in this lawsuit?

8 MR. RHODES: Those are the only two, Your Honor.

9 THE COURT: Section 1 and Section 4?

10 MR. RHODES: That is the only ones that Chief Justice
11 Randolph was a part. And the other one that we are asking
12 that House Bill 1020 and Senate Bill 2343 be declared as
13 unconstitutional in violation of the Equal Protection
14 Clause. So we are saying that declaratory relief could be
15 issued concerning that and injunctive relief only as to
16 Section 1 and 4. The Court has already ruled on Section 1.
17 So we are still asking for injunctive relief under Section 4
18 as well as declaratory relief under --

19 THE COURT: That hasn't been filed yet, has it?

20 MR. RHODES: It has not been filed yet, Your Honor.
21 That is why we were asking -- filed the motion for -- to
22 clarify your -- the order to say the dismissal only dealt
23 with Section 1. It didn't deal with the -- all of the
24 claims that the plaintiff had brought against the Chief
25 Justice.

1 THE COURT: But this Court ruled on all of the claims
2 that are presently -- at least that had been presently
3 brought against him.

4 MR. RHODES: Yes, Your Honor.

5 THE COURT: Because you still had not filed a specific
6 claim against him under Section 4.

7 MR. RHODES: We hadn't filed a motion for injunction
8 yet. We filed the claim in the complaint. The complaint
9 was against all defendants.

10 THE COURT: Right. But you didn't spell out any
11 particulars concerning him in Section 4, though, did you?

12 MR. RHODES: No, Your Honor. We asked for injunctive
13 relief against all of the defendants.

14 THE COURT: Against all defendants.

15 MR. RHODES: All of the defendants. Which would have
16 included Chief Justice Randolph.

17 THE COURT: But you never broke him out as an
18 individual defendant, though.

19 MR. RHODES: No, Your Honor. And we did not file a
20 motion yet on Section 4, because Section 4 doesn't come into
21 effect until a little later on. We were under a short time
22 period with Section 1. Section 1 took effect within 15 days
23 after passing. Section 4 we had all the way up until -- so
24 we broke our injunctive request up. We didn't do all of the
25 injunction on all of the claims at one time. We only did

1 Section 1.

2 THE COURT: But now it seems like there is awkwardness
3 here, because there is a motion to consolidate these two
4 cases.

5 MR. RHODES: Yes, Your Honor.

6 THE COURT: And this Court has to look at the offerings
7 of both cases at this point. But you are telling me that on
8 one case, that you intend to file some matters that could be
9 considered in this matter of consolidation, that those
10 matters have not been filed.

11 MR. RHODES: Now, what we intend to file is a First
12 Amendment claim, and the reason it had not been filed when
13 we filed our original lawsuit -- when we filed the lawsuit,
14 Section 1 was ripe. All of our plaintiffs had standing to
15 challenge Section 1, but our plaintiffs intend to bring some
16 First Amendment activity within short order. But at the
17 time we filed our complaint, they had not done it. So they
18 did not have standing because they didn't have any intention
19 for First Amendment activity at that time.

20 So that is why we put in our complaint that not yet,
21 because when it was -- when our plaintiffs got standing to
22 bring that First Amendment, then that is why we were asked
23 to amend later on to bring a First Amendment claim.

24 THE COURT: But where before today could the Court have
25 found this explanation? Before today? Because I don't

1 remember reading anything that would have told me that your
2 plaintiffs intended at a later date to file a First
3 Amendment claim once events unfolded that would give certain
4 newly designated plaintiffs standing. Where would I have
5 known that that was your intention?

6 MR. RHODES: Well, sort of implied when we said "not
7 yet," Your Honor.

8 THE COURT: Well, that is a whole lot to be implied,
9 though, isn't it? Because you put in your complaint that --
10 at this time that you all were not ready to challenge. But
11 you didn't even say First Amendment. It just merely said
12 that you was not ready to challenge the other statute at
13 all. You said "at this time." So how was I to know whether
14 you wanted to challenge later under First Amendment grounds
15 as opposed to discrimination grounds?

16 MR. RHODES: And, Your Honor, we did make allegations
17 from -- I think paragraph 104 might have been the start and
18 went all the way through the end, where we did make
19 allegations, First Amendment allegations. And in our
20 complaint at paragraph number 10, we say that the prior
21 restraint provision profoundly limits an exercise of First
22 Amendment rights by plaintiffs and others like them. And
23 then later on we say we're not challenging it yet because
24 our plaintiffs at that time we filed had not -- did not have
25 the standing to do it. And when the regulation's done and

1 when the plaintiffs get ready to engage in First Amendment
2 activity, that is when they intend to amend the complaint
3 and ask the Court for leave to amend to bring in this First
4 Amendment claim.

5 THE COURT: But you are even saying presently you are
6 not bringing that claim. Even right now, you are not
7 bringing a First Amendment claim?

8 MR. RHODES: Maybe sometime this summer, Your Honor,
9 but not right now.

10 THE COURT: Okay. And then by that, I presume you are
11 saying that you expect this lawsuit to still be lingering on
12 until some point in the future when you are ready to bring a
13 First Amendment claim?

14 MR. RHODES: Yes, Your Honor. We still have a request
15 for declaratory relief and request for relief under Count 3,
16 that dealing with Section 4 of House Bill 1020, which we
17 haven't teed up yet. So maybe by the time it gets teed up,
18 our plaintiffs would be in the position to file a First
19 Amendment claim and we'll ask the Court to amend -- for
20 leave to amend.

21 THE COURT: Well, would you agree with me that you run
22 the risk, if you later file this claim, that the Court might
23 deny it on the basis that the rest of the lawsuit has
24 progressed too far to allow a brand-new claim to come in?

25 MR. RHODES: Your Honor, and we figure that we ran the

1 risk if we had filed the First Amendment claim before we had
2 standing, the Court would have dismissed us -- dismissed it
3 for lack of standing.

4 THE COURT: So this is sort of a -- a gamble that you
5 are willing to take?

6 MR. RHODES: Yes, Your Honor.

7 THE COURT: Okay. Thank you very much.

8 MR. RHODES: Thank you, Your Honor.

9 MR. NELSON: May I be heard on that, Your Honor?

10 THE COURT: Well, go ahead. Let me just hear what you
11 have to say then, because I need to get back to her. She's
12 anxious --

13 MR. NELSON: Yes, sir.

14 THE COURT: -- to finish up her presentation. But go
15 ahead.

16 MR. NELSON: Your Honor -- I'm sorry. I didn't mean to
17 interrupt.

18 THE COURT: Go ahead.

19 MR. NELSON: What we just heard was not that the
20 complaint contends but the plaintiffs intend at some future
21 date to sue my client. Once again, we heard the buzzwords
22 "administrative act" versus "judicial act." So apparently
23 there is some future litigation that is going to come up
24 that involves alleged administrative acts.

25 Now, they have alleged in this case that the

1 appointment of judges are administrative acts. So I don't
2 think that there is any red line for them out there. What
3 this highlights, Your Honor, is our need for finality. Your
4 Honor dismissed the lawsuit against my client. My client is
5 not a party to this case. And I am glad we stayed here,
6 because we could hear what is going on in here and what is
7 planned in the future for my client. My client was
8 dismissed from the complaint, and what I am hearing now is
9 that what we are going to be subjected to is -- my client is
10 going to be subjected to is piecemeal litigation. The rules
11 speak volumes about preventing piecemeal litigation.

12 That's my comments at this point. And, of course, my
13 client has nothing to do with any prior restraints for
14 anything. And particularly the senate bill, my client is
15 not implicated in that at all.

16 THE COURT: All right. Counsel, I am not about to give
17 an opinion that might be construed as advisory or incomplete
18 or inchoate at this point. But at this juncture, I don't
19 have any motion to amend the complaint.

20 MR. NELSON: Yes, sir. Yes, Your Honor.

21 THE COURT: There is nothing in front of me as I was
22 speaking with Mr. Rhodes to say that this is even a matter
23 on my docket at this point. There is no claim in the NAACP
24 lawsuit which addresses First Amendment rights. That's in
25 the other lawsuit. It's not in this lawsuit at all.

1 Mr. Rhodes indicates that he might file one later when he
2 can identify relevant plaintiffs and identify perhaps a
3 charging circumstance. I don't have either one of those in
4 front of me at this point. I do not have the plaintiffs. I
5 do not have any circumstance. I do not have a -- even a
6 motion to amend.

7 So while we are having this discussion on this point,
8 it is actually not ripe to have this discussion because
9 there is nothing in front of me on these points. I have
10 emphasized, from this morning on, the difference between the
11 two complaints and given counsel for the coalition
12 plaintiffs to tell me where there is an interconnect -- an
13 intersect or whether there is a commonality of law issues.
14 And if she has something else that she wants to add, then I
15 am going to listen to it. But at this point, we are where
16 we were earlier; namely, that looking at the wording on the
17 page, one of the lawsuits, the coalition lawsuits, urges a
18 First Amendment claim, and the NAACP suit, you know, asserts
19 a discriminatory claim. They are not the same.

20 And I have asked questions as to how should I view them
21 as being so common, so related as to -- for me to allow this
22 measure that is not being asked to put these two lawsuits
23 together. I am still inquiring. But your objection is an
24 objection that I anticipated that you would make. But at
25 this juncture, it is not an issue that is before the Court,

1 and so even though you made the comment about it being
2 piecemeal litigation, I don't have that right now in front
3 of me, you know, because I don't have those extra pieces
4 that have been mentioned. And I am waiting to see what is
5 going to happen on those, and I am sure if they were to
6 happen right now, they would.

7 But let me point out something else, is that is, I
8 asked Mr. Rhodes whether he was willing to gamble that this
9 lawsuit would not be so far advanced at the time that he
10 would want to amend the complaint where the Court would deny
11 the amendment. Because if we have gone through significant
12 discovery and also through motion practice and the matter
13 has already been teed up perhaps for trial if there is a
14 trial necessary, then on a motion to amend, this Court might
15 very well deny that motion to amend, which is why I asked
16 Mr. Rhodes if he is willing to -- to gamble on the matter.
17 And so -- because the Court might deny a motion to amend, in
18 which case this other matter will never come back up again.
19 And the Court might even decide that this Court should grant
20 your motion on finality, and that too would have an impact
21 upon this alleged second claim.

22 So we have some things here which are, at this
23 juncture, incomplete, and we have here some matters that
24 have not been fully developed and finished. I still have
25 some opinions I want to go ahead and write up on, and that

1 is going to give us some more flavor concerning this whole
2 matter. So we will find out where we are with regard to all
3 of these matters, and then we will know whether you would
4 have a further motion at that time. But at this point, as I
5 just said, these matters are still separate. Okay?

6 MR. NELSON: I understand, Your Honor.

7 THE COURT: Okay. Thank you. All right.

8 All right. I know you have been dying to get back at
9 the podium. You have stood up there -- you have tried to
10 approach the podium two or three times.

11 MS. WU: All of my notes are up here.

12 THE COURT: Oh, that's what it was? You wanted to come
13 up here and retrieve your notes?

14 MS. WU: Yeah.

15 THE COURT: But I know that you have wanted to come up
16 here two or three times. And so then I would say hold it,
17 and then I'd take up something else, and then there you are
18 again.

19 Now, are you ready now?

20 MS. WU: I am, Your Honor.

21 THE COURT: Okay. Go ahead.

22 MS. WU: Thank you, Your Honor.

23 I wanted to provide a road map to the conclusion of my
24 comments, so I am going to start off --

25 THE COURT: Well, let me say this: I have an idea

1 where we are going. Remember, you have to go through these
2 elements as to why this Court should consolidate these two
3 cases, and there are certain factors which go into that
4 inquiry: commonality of law facts and *et cetera, et cetera*.
5 And it is about five others, and you were going to go
6 through each one. Am I right?

7 MS. WU: Yes, Your Honor. And I will do that. I
8 wanted to start off with answering your question about
9 Randolph. Judge Randolph has nothing to do with our First
10 Amendment claim, period.

11 I wanted to also make one last comment about the
12 question of whether the NAACP will ever have a First
13 Amendment claim in its case. This will be my last comment.
14 On the question of consolidation, we do have an NAACP
15 complaint that alleges First Amendment violations but does
16 not request an injunction. In ours, our complaint alleges
17 First Amendment violations and requests an injunction. So
18 for the purpose of consolidation, it is our opinion that the
19 complaints do raise common questions of fact and law on a
20 question of the First Amendment claim. I understand that
21 might not be something that you agree with, but I wanted to
22 end it at that.

23 I wanted to address the last comment -- the last
24 question that you asked us before we took a break, which was
25 are there questions of facts that could arise in a

1 consolidated version of this case, which if you make a
2 judgment on one -- as to one party's facts, that could
3 prejudice the other party's facts. Our team mulled that
4 over. We were not able to come up with an example where
5 that would be the case, but I did want to try to drill down
6 and give you something very specific on facts which could
7 overlap where, if these cases were consolidated, it would
8 increase judicial efficiency in order to address them both
9 at the same time.

10 So one potentially common category of facts on the
11 Fourteenth Amendment and First Amendment claims is the
12 justifications that lawmakers had and the justifications
13 that the government has now with regards to the provisions
14 of 2343 that we both challenge, which are different at this
15 time.

16 So just to give you one example, we allege in our
17 complaint that 2343 was passed amid a wave of protests that
18 were critical of the State and that those protests were
19 peaceful. For us, there may be a set of facts which makes
20 clear that there is a long history of peaceful protests in
21 Jackson. For us, that would go to an argument that the
22 State cannot bear its burden that the prior written
23 permission provision furthers the substantial or compelling
24 government purpose. It is not about intent, but it is about
25 looking under the hood for the justification the government

1 gives, as is required in the First Amendment context, and
2 trying to figure out if the justification that they give is
3 the actual justification, which is what is required in the
4 First Amendment context.

5 It is not rational basis where any legal -- legally
6 supported reason for legislating around the issue will do.
7 It has to be not only a substantial purpose; it's got to be
8 the actual purpose. So you can imagine a situation where --
9 I'll give you a very concrete example. Governor Reeves --
10 I'm sorry -- yeah. Governor Reeves, in 2020, during the --
11 there was a lot of protests across the country, and he made
12 various statements to the press when he said, in
13 Mississippi, we have peaceful protests. I am proud of us.
14 We do not have incidents of violence. And he went on the
15 record talking about how peaceful Mississippi protests are.

16 So you can see from our perspective bringing a First
17 Amendment claim that also has the Fourteenth Amendment
18 intermediate scrutiny part to it that we would use those
19 facts in order to show that the government cannot bear its
20 burden of showing that its prior written permission
21 pervision furthers a substantial or compelling government
22 interest.

23 Those same facts regarding the government's public
24 statements about the history of peaceful protests in Jackson
25 could potentially be used -- I'm speculating here -- by the

1 NAACP plaintiffs also to talk about a lack of a
2 nondiscriminatory purpose. I am just guessing. So that is
3 an example of the fact that even though we don't have the
4 exact same legal claims, and we are not furthering the exact
5 same legal theories, we are operating in the context of the
6 Mississippi Legislature in 2023 crafting and passing S.B.
7 2343, which is an expansion of the authority of the
8 Department of Public Safety and the police.

9 2343 and the provisions we challenged, they were baked
10 in the same oven. They came out of the same legislature.
11 They were argued on the same floor. The evidence about the
12 government's justification and whether it satisfies our
13 standard for our claims or the NAACP's standard and their
14 claims, that is the same bucket.

15 And I am -- I am wary of explaining it that way,
16 because I do want to make clear that we are not -- we do not
17 bring an intentional discrimination claim. A burden is
18 on -- squarely on the government to prove that they have a
19 permissible, compelling, or substantial interest in passing
20 the written provisions.

21 But the facts are all the same. It truly would be
22 duplicative to have two courts investigating the
23 circumstances under which 2343 was passed. While we don't
24 care about intent, we care about justification and the
25 ability to say this was, in fact, the reason. This reason

1 is, in fact, substantial. There is a basis in history and
2 in -- and in prior events for passing something as sweeping
3 as 6(c) is.

4 So we are going to be arguing a lot of the same facts.
5 We believe it truly would be duplicative if it was before
6 two judges at this point. Your Honor is the expert in 2343.
7 It seems much more rational for us to be before Your Honor
8 talking about these issues.

9 Though I -- you know, I do understand that you want to
10 focus potentially on thinking about consolidation as a --
11 you know, as a -- thinking of it that there is a barrier
12 because we are not urging the exact same claims. But I
13 would say the fact that we are all in the same kitchen with
14 regards to 2343 is a very substantial factor that should
15 weigh in favor of consolidation. I will go quickly through
16 the other factors.

17 As you know, the actions are pending before the same
18 judicial district. We have common parties involved. We
19 have the same defendants who are going to be responsible for
20 implementing the provisions we both challenge: 6(a) and (b)
21 on the NAACP side; 6(c), both Commissioner Tindell and Chief
22 Bo Luckey. We both want to enjoin them from implementing
23 those consecutive provisions. We believe there are common
24 questions of law and fact both with regards to the
25 allegations of First Amendment violations and with regards

1 to the question -- the common questions of fact on
2 government justification for passing 2343. We don't believe
3 that there is a risk of prejudice or confusion if the cases
4 are consolidated. However, there is a risk of inconsistent
5 factual and -- inconsistent adjudications of factual and
6 legal issue.

7 As an example of legal issues that could be
8 inconsistently adjudicated -- just one at this moment I'm
9 thinking is, you know, the government has argued in its
10 responsive brief that 2343 doesn't go into effect on the
11 date that the legislature says it goes into effect. They
12 have argued that it goes into effect when -- at an disclosed
13 later date whenever they decide that they are -- they are
14 ready.

15 So if we were to split up our cases and we proceed
16 before Judge Lee, we would be urging an interpretation of
17 2343 that says the agency -- no state agency nor the AG can
18 stand in for the legislature and rewrite an effective date.
19 Before Your Honor, there may be a different argument. If
20 two courts decided that differently, that could create
21 confusion.

22 The last four consolidation factors are whether
23 consolidation will conserve judicial resources. We believe
24 it will in large part, because 2343 is a universe, and we
25 are both in that universe. And so to have that same

1 universe re-created in two courts we believe will be a waste
2 of judicial resources when they could be consolidated before
3 Your Honor.

4 We don't believe that there will be any unfair
5 advantage to either party if the cases are consolidated. In
6 particular, those cases are at the same procedural posture.
7 They were filed a few weeks apart. They seek the same
8 remedy. They are suing the same defendants, both civil
9 rights actions brought under 42, you know, 1983 and both
10 seeking declaratory and preliminary -- pardon me -- and
11 injunctive relief. So we think that nobody is going to be
12 prejudiced. Nobody is going to be waiting around for
13 anybody else. We are actually going to be in this together,
14 so nobody will be unfairly advantaged.

15 We do think it will reduce the time for resolving the
16 cases for a similar reason and that it will reduce the cost
17 of trying the case separately, again, because re-creating
18 the universe of the context in which 2343 was written,
19 passed, and arose and the history that it was or was not
20 founded on is going to be brought into being in one court
21 instead of two.

22 THE COURT: You are not asking for exactly the same
23 remedy, though, are you? Because the NAACP is asking for
24 holding that the entire statute is unconstitutional. You
25 are only attacking two sentences, as you put it, but,

1 nevertheless, that first sentence is a very long sentence.

2 MS. WU: It is, Your Honor.

3 THE COURT: That is a long paragraph. So it is
4 interesting when you say it is only two sentences, but that
5 first sentence is an entire paragraph. And then there is
6 one line at the end that makes a second sentence. But you
7 are only attacking those two sentences?

8 MS. WU: We are, Your Honor. And, again, I would -- I
9 would urge the Court to take comfort in the simple language
10 of 42(a) on this -- on this question. They only require a
11 common question of law or fact, plus any reason that Your
12 Honor would like to take into consideration in your broad
13 discretion of considering consolidation. And the case law
14 that interprets 42(a) likewise uses very broad language,
15 mostly about efficiency and not so much about there needing
16 to be the parties who are seeking to address the exact same
17 law in the exact same way.

18 So this is a cite from *Attala Hydratane Gas versus*
19 *Lowry*. It is a Northern District of Mississippi case, and I
20 am going to clean it up. But within it, it cites a Fifth
21 Circuit case and a Seventh Circuit case that was affirmed
22 that the Supreme Court 42(a), quote, "is designed and
23 intended to encourage the consolidation of actions . . . and
24 the court, in the exercise of the broad discretionary
25 authority allowed by Rule 42(a) and decisions relating to

1 consolidation, . . . should allow this remedy as a matter of
2 convenience and economy whenever it is reasonable under the
3 circumstances to do so."

4 THE COURT: Finally, this question: Are you asking for
5 consolidation for all purposes including trial, or are you
6 asking for consolidation in a limited manner where the two
7 cases are consolidated for discovery only?

8 MS. WU: Your Honor, we have asked in our motion for
9 consolidation for all purposes. However, it is within a
10 court's broad discretion to consolidate for only particular
11 proceedings. So under 42(b), "Separate Trials," a court
12 may -- "For convenience, to avoid prejudice, or to expedite
13 and economize, the court may order a separate trial of one
14 or more separate issues or claims." So we have moved for
15 consolidation on all -- for all purposes. But it is up
16 to -- it is within Your Honor's discretion to parse that if
17 you believe that there is greater judicial economy or less
18 risk of an outcome that you -- you are not comfortable with.

19 THE COURT: All right. Thank you very much.

20 MS. WU: Thank you, Your Honor.

21 THE COURT: Response?

22 MR. WILLIAMS: Good afternoon, Your Honor. May it
23 please the Court?

24 THE COURT: Yes.

25 MR. WILLIAMS: Chad Williams here on behalf of the two

1 respondents, Commissioner Sean Tindell and Chief Bo Luckey.

2 Your Honor has a very thorough understanding of the
3 issues surrounding the consolidation issue and the motion
4 that was filed. I see no value being added by me sitting
5 here going through the points I made in my brief, because
6 they are there. You have clearly reviewed them and
7 understand them. So I am happy to answer any questions you
8 may have from me.

9 THE COURT: You said there was only -- you only agreed
10 with the other side on one point, and that was the first
11 one, that this matter is in both courts.

12 MR. WILLIAMS: That's correct, Your Honor.

13 THE COURT: And that is the only one you agreed upon?

14 MR. WILLIAMS: That's correct, Your Honor.

15 THE COURT: All of the rest of the factors you
16 disagreed on?

17 MR. WILLIAMS: That's correct, Your Honor.

18 THE COURT: All right. And you said that there was no
19 common issues on law and, for that matter, not even facts.

20 MR. WILLIAMS: That's correct, Your Honor.

21 THE COURT: Do you have anything else to add on any of
22 those points, then?

23 MR. WILLIAMS: Well, we have just heard from my friend
24 Ms. Wu that we have some speculative possibilities that
25 there could be down the road at some point a fact question

1 pop up. I would think it would be prudent, if one was going
2 to consolidate a case, that those -- those factual
3 allegations line up at the time the request is made.

4 Likewise, I do take issue with her representation that
5 we should be looking at this from the legal question
6 standpoint of, oh, there are constitutional questions at
7 issue, as she pointed out Judge Jordan had said in some
8 order, the Mississippi Constitution is at issue, so that
9 weighs in favor of consolidation.

10 I don't think that's very accurate for two reasons:
11 One, you can see where we pointed out the different
12 standards that are going to apply that have been talked
13 about here today multiple times; and, two, the idea that
14 because any legislation is baked in the oven during the
15 legislative session over there, that anything relating to
16 that legislative session should be consolidated into one
17 case. They are essentially asking that the first person to
18 file a challenge to any law out of a legislative session,
19 anybody else comes along should be able to consolidate that
20 challenge in there because it was all baked in the same
21 oven.

22 Well, just because a cat has kittens in the oven don't
23 make them biscuits. These laws go into effect for different
24 reasons, and there aren't any allegations in their case that
25 have to do with race and whether these were race-based

1 decisions. And to say that they get down the road at some
2 point and stumble over some piece of evidence that could be
3 used in one case or the other I don't think is a compelling
4 argument for consolidation.

5 THE COURT: You heard me ask the plaintiffs whether
6 there was, at this juncture, any identifying factors that
7 could usher in the embrace of res judicata or collateral
8 estoppel. You heard those questions.

9 MR. WILLIAMS: I did, Your Honor.

10 THE COURT: And your comment?

11 MR. WILLIAMS: There are none, Your Honor. For one
12 reason is we've -- even though we have overlap of two
13 defendants here, Commissioner Tindell and Chief Luckey, in
14 the 1020 case, that has to do with the -- their pot,
15 potentially, and I don't claim to understand everything
16 going on in the 1020 case. But there seems to be some
17 arguments that they could be constrained from acting on a
18 piece of legislation.

19 Over in the 2343, we have the issue of the regulations
20 and their conduct and what they do, which I would like to
21 bring that point up. The NAACP plaintiffs are called up
22 here by the coalition plaintiffs to point out their
23 tremendous standing and ripeness problems in the coalition's
24 case. They made -- the regulations haven't even gone into
25 effect. They sat up there and said they don't know what

1 they are going to say, they don't know what kind of impact
2 it's going to have on the case, and they don't know when
3 they are going to go into effect.

4 So that's our position on that. They're two separate
5 inquiries. The reason -- the defendants are here for two
6 separate reasons, and there couldn't be any collateral
7 estoppel or res judicata as to those two defendants, Your
8 Honor.

9 THE COURT: You are correct about the plaintiffs'
10 position at this point of their unawareness of what the
11 regulations for issuance for a permit to march might
12 contain, because the plaintiffs pointed that out themselves
13 in their brief, that they don't know what those regulations
14 might be. And since they don't know what those regulations
15 might be, that was one of the reasons one could glean from
16 their papers as to why they had not filed thus far, because
17 the two defendants in the coalition case are the two persons
18 to whom one could resort to ask for that measure of being
19 allowed to march or to make speeches at various places,
20 *et cetera*.

21 But they have to be governed by some regulations, and
22 those regulations have not been promulgated yet. And so
23 inasmuch as those regulations are not, at this juncture, in
24 existence, the plaintiffs in the NAACP case elected not to
25 go forward at this point. It would seem to me that based on

1 that, without those regulations, that there's some
2 difficulty in bringing that lawsuit on the matter of speech.

3 It would seem like that might not be as ripe as the
4 plaintiffs in the coalition case might like, and I'm only
5 saying that, not as a finding from my court, but I am only
6 saying that because that is something which is embedded in
7 the responses of the NAACP in their brief. They submitted
8 that and said that point. And so it seems like they were
9 questioning whether the coalition plaintiffs would have
10 standing at this point or would have a claim on First
11 Amendment at this point.

12 What's your thought on that?

13 MR. WILLIAMS: They absolutely do not. And I think
14 Mr. Rhodes was perfectly clear earlier. That's the reasons
15 I didn't have any questions for him, is that they admitted
16 they had a standing problem, because none of their
17 plaintiffs had planned a -- any kind of a protest or a march
18 or any other speech, and they had a ripeness problem,
19 because they don't know what the regulations are yet.

20 We intend to address this when we get to the briefing
21 schedule Judge Lee has laid out for us in the coalition's
22 case, which is not even due until next week, early next
23 week. We haven't even filed our brief on this issue. It
24 will be raised. Our motion to dismiss our answer is not due
25 until the end of next week. So I am a little on my heels

1 when it comes to how rapidly this has been moving, but I am
2 very certain about that they do have a ripeness problem,
3 Your Honor.

4 THE COURT: All right. Anything else you want to
5 submit to the Court?

6 MR. WILLIAMS: We would just ask that you deny their --
7 the coalition plaintiffs' motion, Your Honor.

8 THE COURT: All right. Thank you.

9 MR. WILLIAMS: Thank you.

10 MR. SHANNON: Your Honor, just for the record, on
11 behalf of the state executive defendants in the NAACP case,
12 we would join in the arguments that Mr. Williams made, and
13 we filed a joinder to that effect.

14 THE COURT: I saw it.

15 MR. SHANNON: Thank you, Your Honor.

16 THE COURT: The defendants in both cases are in
17 lockstep, as are the plaintiffs over here in both cases are
18 in lockstep. All right. Thank you.

19 MR. SHANNON: That's correct, Your Honor.

20 THE COURT: All right. Anything else over here?

21 MS. WU: Thank you, Your Honor.

22 I wanted to respond to the -- to Your Honor's
23 consideration of whether or not our claim was ripe. The
24 motion for preliminary injunction is not before this Court
25 at this time, but our motion and our memo are supported by

1 multiple affidavits by our plaintiffs that explain why our
2 claim is ripe.

3 I am just going to read one paragraph from one of them.
4 "Mississippi Votes and I plan to continue to protest on
5 sidewalks and streets in Jackson beside state government
6 owned and occupied buildings in the future, including during
7 July of 2023. For example, Mississippi Votes plans to
8 protest by such properties, including the State Capitol, the
9 Mississippi Supreme Court, and the Governor's Mansion,
10 during coalition actions on July 6th, July 8th, July 18th,
11 and July 27th, 2023.

12 "We plan for one or more of these actions to include
13 walking on sidewalks without blocking pedestrian traffic
14 along the east and south sides of the State Capitol with a
15 City of Jackson permit. We also plan to march in North
16 Congress Street and have a rally in front of the Governor's
17 Mansion. One ore more of our protests will take place by or
18 pass by privately owned properties and office buildings
19 downtown, which may be occupied by state government
20 officials. I cannot tell by looking at them if they are,
21 and I do not know how to find out."

22 These declarations -- there are many of them -- go on
23 to explain that these plaintiffs have already created
24 digital flyers -- this is what they use to promote their
25 actions -- listing some of these protests' actions for which

1 they have already obtained City of Jackson permits, which
2 they have planned for the month of July.

3 However, this is paragraph 19 of one of our clients'
4 affidavits. "I have read the language of S.B. 2343 that
5 requires us to obtain Commissioner Tindell or Chief Luckey's
6 written authorization if we want to protest on a sidewalk or
7 street beside a building owned by the State or occupied by
8 state officials, or if we want to protest anywhere, if
9 movement into or out of such a building might be somehow
10 hindered. I do not believe we should be required to obtain
11 prior permission from them to protest. I believe the
12 written permission requirement of S.B. 2343 is
13 unconstitutional.

14 "I am concerned that if we do not comply with the
15 requirement and do not obtain written permission, and still
16 exercise our right to protest, some or all of those who
17 participate, including me, will be arrested, prosecuted, and
18 convicted of a crime related to not complying. I am
19 concerned that if we do not comply with this law, we could
20 be arrested.

21 "In the future, we could also be prosecuted in the new
22 CCID court and, if convicted, be sent to prison in
23 Mississippi. Because of these concerns, we have not yet
24 begun to circulate the digital flyer that has been created
25 to publicize the July 2023 protest events, which is critical

1 for us as organizers to already be doing."

2 So we have multiple plaintiffs among them. We have --
3 they have secured City of Jackson protest permits for
4 July 6th, July 8th, July 18th, and July 27th.

5 They include, in support of our motion for preliminary
6 injunction, many pages, Your Honor. The evidence is the
7 past digital flyers that they have created and used to
8 publicize their protest events, and they each in their
9 declarations list between a couple or a half dozen previous
10 actions where they have engaged in expressive behavior which
11 would be prohibited by Section 6(c).

12 It is our very emphatic position that July 1, 2023, is
13 the effective date. We also urge a primary argument in our
14 motion for preliminary injunction, which is that we can
15 prove now that the government cannot establish that it has a
16 compelling or substantial interest in implementing this
17 prior written permission provision. We are ready to go on
18 that. We could go next week. We could have a couple hours.
19 If this case is consolidated, we would be ready to urge that
20 the provision on its face is unconstitutional, that no rules
21 or regulation should be promulgated to effectuate an
22 unconstitutional law.

23 Rules and regulations must be promulgated consistent
24 with the statute, and we argue there is no set of rules or
25 regulations which can be promulgated which are consistent

1 with the statute, which would cure its grave constitutional
2 infirmities.

3 THE COURT: Now, you are supposed to make a response to
4 Judge Lee by what date?

5 MS. WU: Defendants are --

6 MR. WILLIAMS: I believe it is June 19th, Your Honor.

7 THE COURT: June 19th.

8 MR. WILLIAMS: That's correct, Your Honor, on the
9 preliminary injunction.

10 THE COURT: Correct. All right. Thank you.

11 MR. WILLIAMS: Yes, Your Honor.

12 THE COURT: So then you said that if this Court decides
13 to consolidate, you are saying that you are prepared to make
14 your response since you filed the motion on that date; is
15 that correct?

16 MS. WU: We could submit a -- we could submit a reply
17 within 24 hours, Your Honor, and we could have a hearing
18 directly after that.

19 THE COURT: All right. And your response is due on the
20 date you just provided. So if this case were -- if this
21 Court were to consolidate, you would be prepared to go
22 forward on or about that date also?

23 MR. WILLIAMS: Your Honor, if you ordered us to, we
24 would be. They have had a six-week head start on us. They
25 didn't bring this suit until beginning of June, so we are

1 trying to get our feet under us on it. We haven't even had
2 our chance to get our affidavits together to submit in
3 response to their motion for preliminary injunctions.

4 We would do whatever you told us to do. But this goes
5 to the element of disadvantage, Your Honor. Here we are
6 trying to come in and hijack a case that doesn't even have a
7 claim existing in it, and they want to have a PI hearing in
8 advance of us even having an opportunity to respond when the
9 judge handling the case told us we could have to respond to.
10 So we would do whatever Your Honor tells us to do, but we
11 would prefer to have a little more time than that.

12 THE COURT: Okay. Thank you very much. All right.
13 Thank you very much.

14 MS. WU: Thank you, Your Honor.

15 THE COURT: Now, I believe those are the matters that I
16 had on my calendar for today, and I will endeavor to get the
17 opinions out as fast as possible.

18 Yes?

19 MR. CLINE: Sorry to interrupt. May I approach with
20 one small issue?

21 THE COURT: Go ahead.

22 MR. CLINE: Your Honor, this concerns the documents
23 that the Chief Justice brought and submitted to the record.
24 Plaintiffs have no objection --

25 THE COURT: Yes. I believe that is what they said, no

1 objections. Go ahead.

2 MR. CLINE: Yes. We have no objection to the documents
3 that were handed to us. I think we inadvertently did not
4 receive a copy of these other documents. This is the set
5 that was handed to the coalition plaintiffs, and upon
6 reviewing these documents, unfortunately, I need to object
7 to the form that these documents are in.

8 We would have no objection to the originals, but these
9 appear to be manually re-created Microsoft Word copies of --
10 I don't know if they are emails or text messages. There is
11 no date on these. It says, text from Judge Green. This
12 doesn't involve the Chief Justice. It is unclear to me what
13 these documents are. But they are not true and correct
14 copies of original documents. So I would just request that
15 if the Chief Justice could submit the true and correct
16 copies of the original to the docket, we would have no
17 objection to getting those in the record.

18 THE COURT: Response?

19 MR. NELSON: Your Honor, he has got everything that my
20 client has, and we would object to this post-fact -- let's
21 go back --

22 We are not sure what the objection is, Your Honor,
23 other than it is apparently something to do with the
24 authenticity of the document, whether or not it is a
25 regularly kept record. We can put the Justice on the stand

1 if you want to, and I can walk through all of the
2 prerequisites if you would like.

3 But, Your Honor, this is a frivolous objection. This
4 is a document created in the judge's office that is
5 maintained as a business record of his office of the Chief
6 Justice's chambers that he had retrieved while we were on
7 lunch break and produced during the proceedings. I am not
8 really sure how whether -- how Your Honor would like to
9 proceed, but I would object to the objection, so to speak.

10 THE COURT: Okay. Thank you.

11 MR. NELSON: One other thing. May I, Your Honor? What
12 deadline is Friday? I'm not really sure what we are
13 supposed to do by Friday. Apparently, the plaintiffs have
14 something to do Friday, and I didn't pick up on what it was.

15 THE COURT: Counsel?

16 MR. NELSON: I'll take it up with counsel afterwards.

17 MR. CLINE: All right.

18 THE COURT: Okay. Now, this objection now to these
19 documents comes fairly late. Earlier when these documents
20 were offered, I asked for objections, and at that time no
21 one had any objections.

22 MR. CLINE: Yes. I'm sorry.

23 THE COURT: So are you saying that you received these
24 documents later?

25 MR. CLINE: Plaintiffs did not receive these documents

1 from the Chief Justice. Plaintiffs -- this copy right here
2 in my hand is from the coalition plaintiffs, who received a
3 different set of documents from the documents handed to us.
4 So while the proceedings were going on, coalition plaintiffs
5 brought that to our attention. I reviewed them, and at that
6 time, while Your Honor was conducting the proceedings about
7 this motion to consolidate, I reviewed them, realized
8 there's no date on them, there's no context, and realized
9 that we would object to them if we had seen them when they
10 were offered into evidence.

11 THE COURT: Let me see what documents we are talking
12 about. Terri -- is the document numbered? Top or bottom?

13 MR. CLINE: They appear to be three memoranda. There
14 is a page 2, a page 3.

15 THE COURT: Well, one second. Hold it. Page 2, what
16 is at the top of page 2?

17 MR. CLINE: There is a page 1 with no page number. The
18 top of page 2 says "replies."

19 THE COURT: Wait a minute. Hold it. Page 2 says
20 "replies." Let me -- read your page 2.

21 MR. CLINE: Page 2, what I am looking at says "replies,
22 David Chandler-Chief (Tomie Green)." That appears to be
23 edited, Your Honor. "(Tomie Green)."

24 THE COURT: Okay. I see that. It says "David
25 Chandler-Chief (Tomie Green), should I email you my report?"

1 Is that what you are talking about?

2 MR. CLINE: That's right.

3 THE COURT: "I just realized there are two chiefs on
4 the text message. My question was for Chief Judge Green."
5 Again, that is what we are talking about?

6 MR. CLINE: That's right. That's the second page of
7 this three-page set.

8 THE COURT: Okay. And then at the bottom of page 2,
9 the last entry is "Tomie Green - I sent you a response. You
10 just need to file order and file with the clerk. DA should
11 have sent order granting the court reporter's cost." Is
12 that the last entry on that page?

13 MR. CLINE: That's right.

14 THE COURT: All right. Now, is there another page?
15 The page right before that is signed by text from Judge
16 Green.

17 MR. CLINE: That's right. That's what I am looking at.

18 THE COURT: And then it says "Text from Judge Green to
19 Justice Jess Dickinson, Justice David Chandler, Judge Betty
20 Sanders, and Judge Isadore Patrick." Is that what you're
21 talking about?

22 MR. CLINE: That's right.

23 THE COURT: Okay. And it is signed -- or at least the
24 name at the bottom of that page is Tomie Green.

25 MR. CLINE: That's right.

1 THE COURT: Okay. And then there is another page right
2 in front of it. It says -- it's "re appointment of special
3 judges"? Is that what you are talking about?

4 MR. CLINE: I'm not sure I have a copy of that, Your
5 Honor.

6 THE COURT: And then it says "Denise Owens" --

7 MR. CLINE: If Your Honor is referring to this
8 document, we have no objections to this document.

9 THE COURT: Pardon me?

10 MR. CLINE: If Your Honor is referring to this document
11 on official letterhead --

12 THE COURT: That's right. "Denise Owens" --

13 MR. CLINE: Yes. We received a copy of this. We have
14 no objection to the entry of this in the record.

15 THE COURT: Okay. So that leaves us two pages left.
16 Those are two pages identified earlier that starts off with
17 "Text from Judge Green to Justice Jess Dickinson,"
18 *et cetera*.

19 MR. CLINE: Yes.

20 THE COURT: And then at the bottom, there is the name
21 Tomie Green. Are you saying you are objecting to that?

22 MR. CLINE: Yes. This page.

23 THE COURT: Well, does it start off like I just said?
24 "Text from Judge Green"?

25 MR. CLINE: That's right.

1 THE COURT: Put it on the Elmo.

2 MR. CLINE: Oh, yes.

3 THE COURT: Yes. That page.

4 MR. CLINE: Yes. That's the first page.

5 THE COURT: Okay. So what's your objection to that
6 page?

7 MR. CLINE: So this page has no date. We have no
8 context from this. At the top it appears to have been
9 edited. It says "Text from," so this is clearly not an
10 original copy, because a text message or an email would not
11 say "Text from." There is no indication of when this was
12 sent. So there is no indication of the surrounding context.

13 Again, Your Honor, we would have no objection to a copy
14 of the original. If this a text message, we would not
15 object to a screen capture of that appearing in the record.
16 If this is an email, again, no objection if they want to
17 provide that original email, but we don't know what this is.
18 We don't know when this was sent.

19 THE COURT: And then the next page has a number 2 at
20 the bottom. At the top it says "replies," and then it
21 starts "David Chandler-Chief (Tomie Green), should I email
22 you my report?" Is that the third page?

23 MR. CLINE: That's right. Same objections. We can't
24 tell from this if this is an email or text message, but
25 parentheses around the name Tomie Green appears to be

1 whoever was keeping this record, their edits to it. We
2 don't know when this was sent. We don't know the
3 surrounding context. But we would also not object to an
4 original -- true and correct copy of the original being
5 provided to the record.

6 THE COURT: Where did you receive the two documents for
7 which you have objections? From whom did you receive those?

8 MR. CLINE: So there is a third document too. May I
9 raise that third -- the third page of this, Your Honor?

10 THE COURT: Well, the third page is "I have reached
11 out" -- is that it?

12 MR. CLINE: Yes, that's right.

13 THE COURT: Okay. And at the bottom of this is the
14 name Tomie Green.

15 MR. CLINE: That's right.

16 THE COURT: It has a date.

17 MR. CLINE: This one does have a date. That's right.

18 THE COURT: In the right-hand corner. It says "Text
19 received Friday, December 4, at 12:45 p.m."

20 MR. CLINE: That's right.

21 THE COURT: So what's your objection to this document?

22 MR. CLINE: So this document as well, we understand
23 that the Chief Justice has handed these out, but there is no
24 indication that this is a true and correct copy of whatever
25 this is purporting to be. I don't doubt that, but there

1 could have been a transcription error. We just have no idea
2 what this is. It says "Text received." That suggests it
3 could be a text message, but this would be an awkward
4 document to send by text message. It looks like a
5 memorandum.

6 THE COURT: From whom did you receive these three
7 pages?

8 MR. CLINE: I received these three pages from Cliff
9 Johnson from -- the plaintiffs' counsel for the coalition
10 plaintiffs.

11 THE COURT: And when did you receive them?

12 MR. CLINE: About an hour ago while Your Honor was
13 having other discussions.

14 THE COURT: So these were not part of the documents
15 that the Chief Justice passed out earlier?

16 MR. CLINE: I did not -- neither I nor Carroll Rhodes
17 received these documents from the Chief Justice. He placed
18 other documents on our desk. We have no objection to those
19 documents.

20 THE COURT: So these are the only three to which you
21 have objections?

22 MR. CLINE: That's right. And just the form that they
23 are in. We have no objections if they want to submit a true
24 and correct copy of the originals.

25 THE COURT: Let me hear a response.

1 JUSTICE RANDOLPH: Well, first, I might comment I'm
2 glad I stayed. And, Your Honor, when I first talked about
3 these documents, I told Your Honor that I had produced
4 copies of text messages to a house judiciary committee, and
5 during the lunch hour, I came back to verify these are the
6 text messages that I presented to the judiciary committee
7 about the ongoing coronavirus, the amount of money that was
8 being spent, substitute judges, and all the questions and
9 anybody could attend. And, again, I said it is probably on
10 YouTube somewhere, because they have been attaching YouTube
11 stuff in the other case.

12 But this is a text from Tomie Green that went to these
13 four people, and if counsel doesn't believe these are
14 accurate, then I will be happy to show up tomorrow morning
15 with those four people under subpoena to show that this text
16 message was sent, delivered, and responded to. I'll request
17 each of them, and I'm certain that each of those judges
18 would be happy to answer if he truly has any serious
19 question about the authenticity.

20 I don't know whether they misplaced them, but Your
21 Honor observed me. I started taking -- I asked my staff
22 during the lunch hour, would you put together ten copies for
23 me of these documents? And I started flying through them,
24 and I got more documents that I didn't have time to review
25 because it was lunch hour. And so then I had the ten

1 copies, and then when I brought them to the Court's
2 attention, you asked that they be introduced into evidence.

3 I don't recall -- I think Mark did mark it down. What
4 does Your Honor have as Document Number 1? It should have
5 an exhibit or something on it, because I don't have an
6 exhibit number on it.

7 THE COURT: Well, it don't have an exhibit on it
8 either. Well, on the first page, it has D-1. But he
9 doesn't have an objection to D-1.

10 JUSTICE RANDOLPH: And D-1 was what?

11 THE COURT: D-1 was the chancery court district --

12 JUSTICE RANDOLPH: That's Denise Owens' letter. Okay.
13 And the other document you should have, and I don't have it
14 in front of me, is a three- or four-page printout. I think
15 it was blue and white, and it talked about the 1593, if I
16 get the number right, cases where I had appointed
17 substituted judges since I have been Chief Justice through
18 May 31st of this year, in that period of time. That shows
19 all the counties and how many appointments and --

20 THE COURT: No, not that.

21 JUSTICE RANDOLPH: Pardon?

22 THE COURT: It's not that one.

23 JUSTICE RANDOLPH: Okay.

24 THE COURT: He's objecting to --

25 JUSTICE RANDOLPH: Oh, I know what he is -- I am trying

1 to find out what Your Honor has before it.

2 THE COURT: I have the others, but since there is no
3 objection, then we need not even discuss the --

4 JUSTICE RANDOLPH: Okay. And what number is what he is
5 saying is objectionable now?

6 THE COURT: There is no number on them. It's just that
7 it says at the top "Text from Judge Green."

8 JUSTICE RANDOLPH: I'm asking exhibit number, Your
9 Honor.

10 THE COURT: The exhibit number was on the first page.

11 JUSTICE RANDOLPH: Only on the first page. And was
12 that a three-page exhibit?

13 THE COURT: Yes. D-1.

14 JUSTICE RANDOLPH: Okay. Okay. So I apologize,
15 because I am not seeing what you have before you.

16 THE COURT: Here. Do you want to see it?

17 JUSTICE RANDOLPH: No. I understand what you have
18 before you now.

19 THE COURT: Okay.

20 JUSTICE RANDOLPH: And Your Honor knows that when you
21 asked -- I asked could these be marked as exhibits, and you
22 asked the clerk to the Court to come and get the exhibits
23 and have them marked, and I told -- handed them to her, and
24 then I walked back over to the table and got a stack of
25 papers, and I tore off each of these.

1 As a matter of fact, the copies I had -- as a matter of
2 fact -- well, I know you are not going to inquire -- I
3 furnished -- since you had brought up my comment about the
4 proceedings, I furnished the press these same things. So
5 these people, if they are still here, and a couple are, are
6 sitting there looking at the very documents that he is
7 claiming that he didn't get that other people got.

8 If a mistake occurred -- which I don't think did,
9 because the first ones that I tore off went to my left,
10 which is counsel's table right here, which that counsel is
11 sitting at, and he is claiming that he doesn't -- he didn't
12 get these documents.

13 So he is showing me another copy, and I can tell the
14 difference.

15 If you will hand me what you have on your desk, and I
16 can show you the difference right now. I can see it. That
17 other document. The one you just -- yeah. Those.

18 Because there -- it's just -- these three documents all
19 are torn, just like the ones that I have are torn. These
20 documents he has here are not torn. I tore those off in
21 front of the Court and put them on this desk. If counsel
22 misplaced them, shame on him.

23 It's a ridiculous -- I never did understand the
24 objection. Is it because you don't believe they are
25 authentic? Is that the objection?

1 Because what I heard, Your Honor, was this: that you
2 can't tell from these when pages -- first page and the
3 second page of when were these documents created or
4 whatever, because there is no reference.

5 THE COURT: Well, hold it. Justice. Chief, I think I
6 might be able to resolve this rather quickly. One second.
7 Just hold it.

8 JUSTICE RANDOLPH: Okay. Let me shut up.

9 THE COURT: No, no. Don't move. Stay right there.
10 Where did we get this from?

11 THE COURTROOM DEPUTY: Those are the ones that the
12 Justice gave --

13 (An off-the-record discussion was held.)

14 THE COURT: Okay. Now, back over here to you all.
15 Where did you get this from? Mr. Johnson?

16 MR. JOHNSON: Cliff Johnson for the coalition
17 plaintiffs.

18 (An off-the-record discussion was held.)

19 MR. JOHNSON: Cliff Johnson for the coalition
20 plaintiffs.

21 I received them from Justice Randolph. At some point
22 they were on my table here. Counsel for the NAACP
23 plaintiffs -- and I recognize that I had documents different
24 than he did, and I provided him -- I allowed him to look at
25 my stack of documents provided by Justice Randolph, and he

1 informed me that he had not received the documents at issue.
2 That was the extent of our conversation. I said he could
3 have my copy and send me a PDF of them. I wish to say out
4 of the line of fire. I made no other comment about the
5 document other than I had something he didn't have.

6 THE COURT: Okay. But you had gotten these from the
7 Chief Justice?

8 MR. JOHNSON: Pardon?

9 THE COURT: But you got these, Mr. Johnson, from the
10 Chief Justice, correct?

11 MR. JOHNSON: That is correct, Your Honor.

12 THE COURT: And Terri tells me that we got the
13 documents too.

14 Now, and at the time I asked were there any objections
15 to any of the submissions. That would have included the
16 initial document, to which there is no objection, that is
17 labeled D-2. And this D-1, I said if there are no
18 objections, then they are going to be admitted. And I
19 didn't hear any objection.

20 So, Mr. Johnson, you had no objection; is that correct?

21 MR. JOHNSON: That's correct. We had no objections,
22 and we voiced no objections, because we are uncertain as to
23 whether we are in this case. But, no, we do not voice an
24 objection, and we lodge no objection.

25 THE COURT: Right. And at that time, you are saying

1 that the front table up here had not received the documents.

2 MR. JOHNSON: I was advised by the NAACP counsel that
3 they did not have the same documents that I had.

4 THE COURT: Okay.

5 MR. JOHNSON: And I provide -- and I said, well, then
6 take mine, and you can send me a copy of what I have
7 provided you.

8 THE COURT: Okay. And do you see anything in these
9 documents that look like they have been tampered with,
10 Mr. Johnson?

11 MR. JOHNSON: I have no reason to think that any
12 documents have been tampered with, and I don't understand
13 that to be NAACP counsel's claim either, to be fair. But to
14 answer the Court's question, I do not.

15 THE COURT: Okay. And next, the documents in the main
16 appear to be from Tomie Green. Now, there is a -- something
17 mentioned from Judge Betty Sanders and David Chandler, but,
18 basically, this is all on Tomie Green. And so then -- I am
19 going to do this.

20 Justice Randolph, just ask Tomie to give us the date --
21 Judge Green -- when these matters occurred. I think that
22 will take care of what his objection is.

23 Would that do that?

24 MR. CLINE: Yes, Your Honor.

25 THE COURT: So then we don't have to go back through

1 any introduction. These documents have already been
2 accepted by me, and the only thing missing is a date that's
3 on here. Read them to her on the telephone and ask her if
4 she knows what date they are. If that's the case, give me
5 the date tomorrow, and that's good enough. You can give it
6 to your lawyer, and he can submit it.

7 JUSTICE RANDOLPH: I'll try, Judge. I don't know
8 Tomie's present whereabouts. I don't even know if I have
9 her phone number. But I also -- it was directed to these
10 other four people. Could I get any one of these four people
11 to acknowledge the receipt of this text and their reply?

12 THE COURT: Well, let me turn over here, then.

13 All you are concerned about is about the relative date,
14 right?

15 MR. CLINE: Yes. Because we are lacking context here.

16 THE COURT: Well, would it be okay --

17 JUSTICE RANDOLPH: Your Honor, can I please --

18 THE COURT: One second. Hold it.

19 JUSTICE RANDOLPH: On the context. On the context.

20 THE COURT: Will it be okay if the Court tomorrow
21 called Judge Green and asked her that?

22 MR. CLINE: I'm sorry. Who would call Judge Green?

23 THE COURT: I would. Any problem with me calling?

24 MR. CLINE: Oh, no. By all means, feel free, Your
25 Honor.

1 THE COURT: Okay. Well then, I will call her, and I'll
2 get the date on it, and then I'll put the date on it, and
3 then we'll go from there. Okay?

4 MR. CLINE: Thank you, Your Honor.

5 JUSTICE RANDOLPH: I'm fine with that. But for
6 purposes of the record, since his objection was to context,
7 then I refer the Court to the document which says "I'm
8 reaching out to y'all. It has been a trying year." It
9 tells us this is an end-of-the-year letter. "And for all of
10 us, it seems if it is getting even darker with the
11 coronavirus. I'm not sure how close you are done with those
12 cases, but we appreciate your efforts."

13 And then it says "Send me a summary of everything
14 you've been working on," and then "Because of the new
15 COVID-19 guidelines and increasing positive results,
16 hospitalizations, and deaths, the risk to health and safety,
17 delayed trials, in-person hearings." All that we know was
18 going on because of 18 administrative orders that I had to
19 issue -- no, I'm sorry -- 20 -- 21, I believe, to allow
20 courts to -- to issue orders not to hold trials, not to
21 allow juries to be called, all of the things that we all
22 lived under. And, of course, you went through it here too,
23 so you well know.

24 But that tell us what's going on, and it says "We still
25 have time to work until December 31st." So that puts it in

1 context. That's when this letter -- we still got time up
2 until the end of the year to get some things done. And then
3 you see the replies from the various judges.

4 The next one -- the third page, shown as page 3, is the
5 text received Friday, December 4th -- I remember it well
6 because that's my birthday -- and Tomie reached out to
7 everybody, and then she references and says, "I should have
8 an idea of anything that's going to go on past
9 December 31st," because the problem we had, we had to get
10 new orders issued, because orders were, like, in six-month
11 increments and what the federal government was required for
12 payments and all of that.

13 So I am working with the judges. I am working with
14 Tomie Green and everybody in there. And, of course, Tomie
15 goes on to talk about the death rates, how it is getting
16 worse, would we put a stay on summonsing jurors and --
17 through February. That would be February of '21. So these
18 are in context. His -- his objection, his inability to
19 read, once again, it's just like he couldn't understand your
20 order.

21 Any other questions?

22 THE COURT: No, no. Thank you so much. I will call
23 tomorrow and put a date on here, and then I will tell the
24 parties what the date is.

25 All right. Thank you. It has been a long day. And

1 thank you so much. And as far as Friday, then the Chief
2 Justice's motion for appealability that was filed June 9 is
3 due Friday. Oh, I'm sorry. It's plaintiff's response to
4 the Chief Justice's motion for appealability is due Friday.

5 Also, there is a reply to the opposition to the motion
6 to clarify, which is also due Friday.

7 Now, those are -- don't move. Those are the matters
8 that you all are -- and they are all on the record, so if
9 you just check the record, you will see in the docket where
10 these matters are already on the docket sheet. But this is
11 what is earmarked for Friday.

12 Any questions?

13 MR. NELSON: No, sir.

14 THE COURT: Okay. Then with that -- all right then.
15 Well, you all are not on my docket for tomorrow. You all
16 don't know how sad I am. I have some matters concerning the
17 water/sewage case tomorrow, so if you all want to come in
18 here and talk about the water/sewage matter, feel free to
19 come on in here, and --

20 MR. KUCIA: I'll be here, Your Honor.

21 THE COURT: Okay. You better talk to her on that.
22 Because we had a session on something that came in
23 yesterday. I think you all should have gotten --

24 MR. KUCIA: Yes, sir, we did.

25 THE COURT: It's an order on that. Yes. And I am just

1 trying to help you out, because you were here yesterday too.
2 And I believe you were here another day too. Yeah. I said
3 you all to go ahead and bring your sleeping bag over here.

4 But anyway, thank you all very much. And check your
5 docket sheets on all of these other cases, and I'll be
6 working on these matters and try to get them in as fast as I
7 can. Thank you now.

8 (Court adjourned at 5:08 p.m.)

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COURT REPORTER'S CERTIFICATE

I, Caroline Morgan, Official Court Reporter for the United States District Court for the Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true, and correct transcript of the proceedings had in the forenamed case at the time and place indicated, which proceedings were stenographically reported by me to the best of my skill and ability.

I further certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

THIS, the 21st day of June, 2023.

/s/ Caroline Morgan, CCR

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